

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896.

No. 392

90.

GUADALUPE THOMPSON, ADMINISTRATRIX OF THE
ESTATE OF ALFRED BENT, DECEASED; GEORGE
THOMPSON, HER HUSBAND; CHARLES BENT, JULIAN
BENT, AND ALBERTO SILAS BENT, APPELLANTS,

vs.

THE MAXWELL LAND GRANT AND RAILWAY COMPANY
AND LUZ B. MAXWELL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW
MEXICO.

FILED DECEMBER 6, 1896.

(16,109.)

710
15
1550

(16,109.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896.

No. 387.

GUADALUPE THOMPSON, ADMINISTRATRIX OF THE
ESTATE OF ALFRED BENT, DECEASED; GEORGE
THOMPSON, HER HUSBAND; CHARLES BENT, JULIAN
BENT, AND ALBERTO SILAS BENT, APPELLANTS,

vs.

THE MAXWELL LAND GRANT AND RAILWAY COMPANY
AND LUZ B. MAXWELL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW
MEXICO.

INDEX.

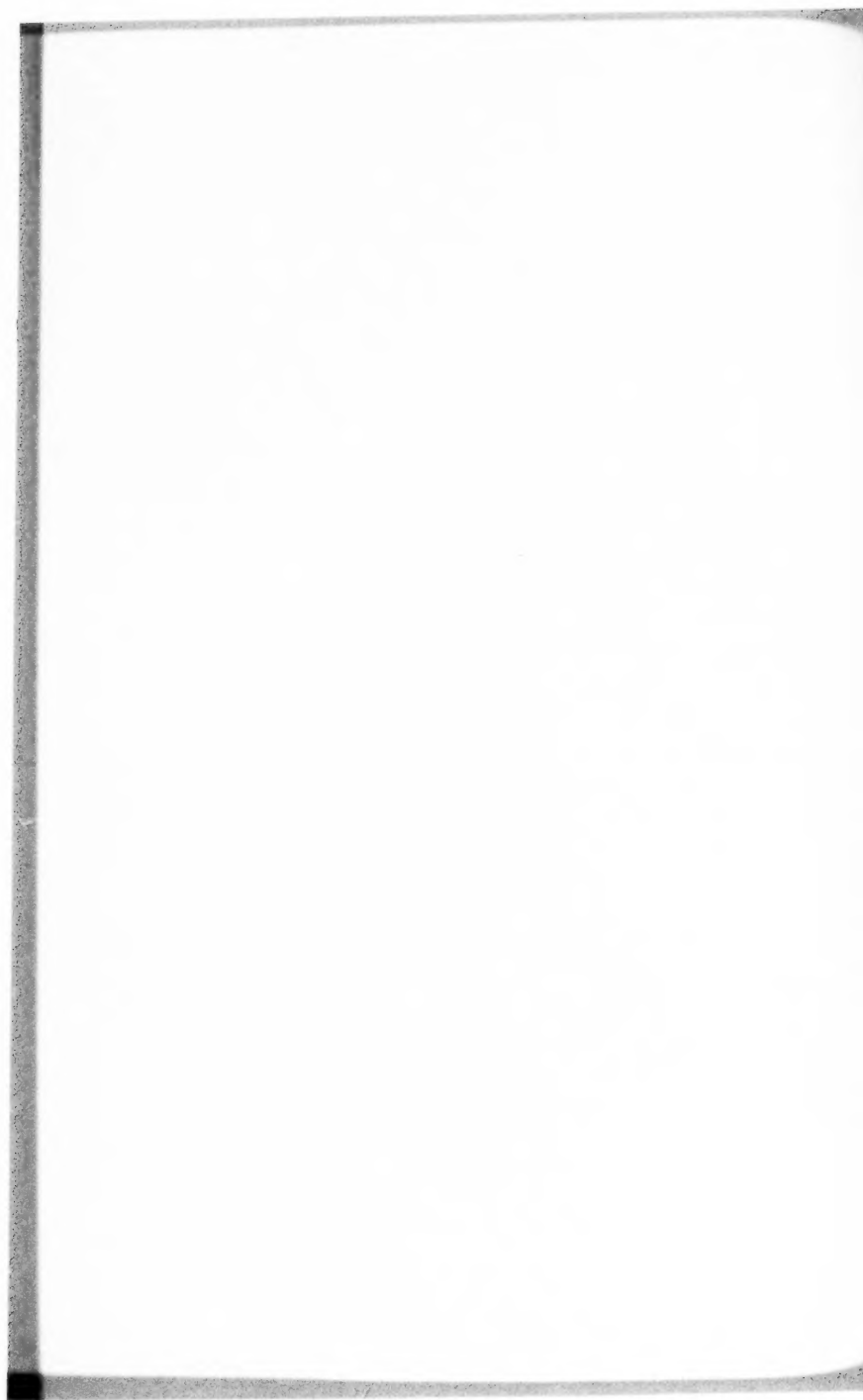
	Original.	Print.
Caption.....	1	1
Transcript from the fourth district court of Colfax county	2	1
Caption	2	1
Bill of complaint.....	3	1
Exhibit C—Certified copy of papers from Beaubien and Miranda grant.....	14	8
D—Certified copy of papers from Beaubien and Miranda grant	27	16
E—Deed from Lucien B. Maxwell <i>et ux.</i> to Max- well Land Grant and Railway Co., April 30, 1870.	33	19
A—Decree in the case of Alfred Bent <i>et al. vs.</i> Guadalupe Miranda <i>et al.</i>	39	24

	Original.	Print.
Exhibit B—Orders in the case of Alfred Bent <i>et al. vs. Heirs</i> of Charles Beaubien <i>et al.</i>	48	28
F—Deed from Aloys Scheurick <i>et ux.</i> to Lucien B. Maxwell, May 3, 1866.....	52	30
G—Deed from Alexander Hicklin <i>et ux.</i> to Lucien B. Maxwell, May 31, 1866.....	55	32
H—Deed from Guadalupe Bent, guardian <i>ad litem</i> , to Lucien B. Maxwell, May 3, 1866.....	58	35
Answer of Guadalupe Thompson and husband to bill.....	63	37
Answer of Charles Bent <i>et al.</i> , infants, to bill.....	68	41
Replication to answer of Guadalupe Thompson and husband..	69	41
Replication to answer of Charles Bent <i>et al.</i> , infants.....	70	42
Order granting leave to amend bill.....	72	43
Amended bill.....	72	43
Answer of Guadalupe Thompson and husband to amended bill.....	84	50
Answer of Charles Bent <i>et al.</i> , infants, to amended bill.....	86	51
Replication to answers to amended bill.....	87	51
Decree.....	89	52
Prayer for appeal.....	93	54
Order allowing appeal.....	94	55
Bond on appeal.....	95	55
Mandate from supreme court of Territory of New Mexico.....	97	56
Decree on the mandate.....	104	61
Amendments to bill of complaint.....	107	62
Amended bill of complaint.....	112	64
Answer to amended bill.....	124	70
Amendments to bill.....	134	76
Further answer of Charles Bent.....	136	77
Judgment on exceptions to answers.....	152	86
Replication to answer.....	168	94
Decree, October 23, 1884.....	170	95
Mandate from supreme court of Territory of New Mexico....	174	97
Decree on the mandate.....	174	97
Stipulation as to evidence.....	176	97
Decree, May 8, 1893.....	177	98
Assignment of error.....	179	99
Decree.....	180	100
Order allowing appeal, &c.....	181	100
Finding of facts.....	182	101
Original bill, filed September 12, 1859.....	183	102
Amended bill, filed May 8, 1860.....	189	105
Answer of Guadalupe Miranda, filed May 15, 1860.....	194	108
Answer of Charles Beaubien, filed September 6, 1860.....	197	109
Answer of Lucien B. Maxwell, September, 1860.....	201	111
Answer of Joseph Pley, April 7, 1860.....	203	113
Interlocutory decree, June 3, 1865.....	205	114
Petition of Guadalupe Bent for appointment as administratrix, &c.....	214	119
Probate of will of Alfred Bent.....	217	120
Will of Alfred Bent, deceased.....	218	121
Inventory of estate of Alfred Bent.....	219	121
Allowance of account against estate of Alfred Bent, &c.....	221	122

INDEX.

III

	Original.	Print.
Order making infants parties complainant	225	125
Order appointing guardian <i>ad litem</i>	226	125
Deed from Guadalupe Bent to Lucien B. Maxwell, May 3, 1866.	228	126
Decree of September 13, 1866.	232	129
Judge's certificate.	240	133
Affidavit of Sol H. Jaffa as to value	240½	133
Affidavit of Albert W. Archibald as to value.	241	134
Opinion.	243	136
Clerk's certificate.	245	137
Bond.	246	137
Clerk's certificate.	248	138
Assignment of errors.	249	139



1 Be it remembered that heretofore, to wit, on the nineteenth day of July, 1894, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a certain transcript of record from the district court in and for the county of Colfax, in said Territory; which said transcript is in the words and figures following, to wit:

2 *Transcript of Record.*

Part first.

THE MAXWELL LAND GRANT AND RAILWAY Co. <i>et als.</i> ,	} Chancery.
Appellees,	
<i>vs.</i>	
GUADALUPE THOMPSON, Administratrix, etc., <i>et als.</i> ,	
Appellants.	

Appeal from the fourth district court, Colfax county.

Pleas in the district court for the first judicial district of the Territory of New Mexico, at a regular term begun and held within and for the county of Colfax at the village of Cimarron, on the twenty-ninth day of August, one thousand eight hundred and seventy-three, on the sixth day of said term, being the

3 fourth day of September, A. D. 1873, the Hon. Joseph G. Palen, chief justice of the supreme court of said Territory and judge of the first judicial district court thereof, presiding.

THE MAXWELL LAND GRANT AND RAILWAY Company, Lucien B. Maxwell, and Luz B. Maxwell, His Wife,	} 45. Chancery.
<i>vs.</i>	
GUADALUPE THOMPSON, Administratrix of the Estate of Alfred Bent, Deceased; George Thompson, Her Husband, and George Boyles, Guardian <i>ad litem</i> of Charles Bent, Alberto Silas Bent, and Julian Bent.	

Be it remembered that heretofore, to wit, on the first day of August, A. D. 1870, the said complainants, by their solicitors, filed in the clerk's office of said district court their bill of complaint in this cause; which bill is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, {
County of Colfax. }

In the District Court of the First Judicial District, Sitting in the County of Colfax, Territory of New Mexico, for the Trial of Causes Arising under the Laws of the Territory, at the August Term, A. D. 1870.

To the Hon. Joseph G. Palen, chief justice of the supreme court of said Territory and judge of the first judicial district court thereof, in chancery sitting:

Your petitioners, Lucien B. Maxwell, of Cimarron, in the county

- of Colfax and Territory of New Mexico aforesaid, and Luz
- 4 B. Maxwell, his wife, and the Maxwell Land Grant and Railway Company, a corporation duly created, organized, and established under the laws of said Territory of New Mexico and having an office and place of business at said Cimarron, bring this their bill of complaint against Guadalupe Thompson, late Guadalupe Bent, administratrix of the estate of Alfred Bent, and her husband, George Thompson, Charles Bent, Juliana Bent, and Alberto Silas Bent, the last three all being minors and all residents of the county of Las Animas, in the Territory of Colorado; and thereupon your orators complain and say that heretofore, to wit, on or about the eleventh day of January, A. D. eighteen hundred and forty-one, the Republic of Mexico, in due form of law, granted to Charles Beaubien — Guadalupe Miranda, citizens of said Republic, a tract of lands, situate in the then province or department of New Mexico, constituting a part of the said Republic, which tract of land was described as follows, namely: Commencing on the east of Red river a mound was erected, from whence following in a direct line in an easterly direction to the first hill another mound was erected at the point thereof and continuing from south to north on the line nearly parallel with Red river; a third mound was erected on the north side of the Chicorica or Chocuaco mesa (table-land); thence turning towards the west and following along the side of said table-land of the Chacuaco to the summit of the mountain where the fourth mound was erected; from thence following along the summit of said main ridge from the north to the south, to the Cuesta del Asha, one hundred varas north of the road from Fernandez to the Laguna Negra, where the fifth mound was erected; from
- 5 thence turning again to the east towards Red river and following along the southern side of the table-lands of the Rayado and those of the Gonzalites, on the eastern point of which the sixth mound was erected; from thence following in a northerly direction to the west side of Red river, opposite the first, where the last and seventh mound was erected, all of which will more fully appear by reference to certified copies of said grant and act of possession herewith filed and made a part of this bill and marked "C" and "D." That the said grant was duly accepted by the said grantees who thereupon immediately entered into possession of the premises, and the said grantees and those holding under them have ever since maintained, and still do maintain, exclusive, quiet and peaceable possession thereof.

That afterwards and on or about the twenty-first day of June, A. D. 1860, the said grant was duly ratified and confirmed by an act of Congress of the United States in pursuance of the provisions in that behalf of the treaty between the United States and Mexico, known as the treaty of Guadalupe Hidalgo. That by sundry conveyances and purchases and by inheritance, on the twenty-ninth day of May, A. D. 1865, the said Lucien B. Maxwell and wife had become and then were the sole owner in fee-simple, and undivided, of the whole of the aforesaid granted premises, with the exception of a few small parcels heretofore sold by them to other persons, who had no inter-

est in the object of this suit, nevertheless subsequent to said last-mentioned date, certain deeds were executed to the said Maxwell in confirmation of purchases previously made by him, and if it should hereafter become necessary the complainants beg leave of the
 6 court to set forth more specifically and in detail the origin of the title of the said Maxwell and wife.

That afterwards, to wit, on or about the 30th day of April, A. D. 1870, the said Lucien B. Maxwell and wife being as aforesaid still seized and pos-essed of the said premises, for a valuable consideration sold and conveyed the premises to the said Maxwell Land Grant and Railway Company by a warranty deed with full covenants, reserving and excepting the home ranch so called, consisting of about one thousand acres of land and certain other small parcels of land and mineral rights; to which said deed, if it shall become necessary, the complainants beg leave to refer, as will appear by reference to a certified copy of said deed made a part of this bill and marked Ex. "E."

The complain-*ts* further say that heretofore, to wit, on or about the 12th day of September, 1859, Alfred Bent, then in full life but since deceased, Estefana Hicklin and Alexander Hicklin, her husband, Teresina Bent, alias Teresa T. Bent, and Aloys Scheurick, her husband, and also by her next friend, Ceran St. Vrain, commenced a suit in the district court of the said Territory of New Mexico, for the county of Taos, in the first judicial district, against the said Lucien B. Maxwell and Luz Beaubien Maxwell, his wife, and sundry other persons who have now no interest in the object of this suit, and who are therefore not made parties thereto.

The complainants further say that diligent search has been made for the pleadings in the said suit of Alfred Bent and others, but the said pleadings cannot be found among the records of this court or elsewhere, and the complainants therefore aver that the said pleadings are lost or destroyed, but the complainants are informed and believe, and therefore aver, that in the petition in the said suit of Alfred Bent and others, it was in substance alleged that by a parole agreement made between one Charles Bent, the father of the said Alfred Bent, Estefana Hicklin, *née* Estefana Bent, Teresina Scheurick, *née* Teresina Bent, and the said original grantees, Charles Beaubien and Guadalupe Miranda, the said
 7 Charles Bent became and was equitably entitled to one undivided fourth part of the aforesaid granted premises, and that to the extent of such undivided one-fourth part the said Beaubien and Miranda and those holding under them were trustees of the legal title for the said Charles Bent in his lifetime; that no conveyance of the said undivided interest aforesaid had been made to the said Charles Bent in his lifetime, that the said Charles Bent died intestate, and that the said Alfred Bent, Estefana Hicklin and Teresina Scheurick were the children and only heirs of the said Charles Bent, and that the defendants to the extent that they, severally and respectively, held legal title to the premises or parts thereof, continued to hold such legal title in trust for said alleged children of Charles Bent to the extent respectively of one undivided fourth part, and among other

things, the said complainants prayed for a partition of the premises upon the footing of the claim as set forth in said petition.

That the parties respectively appeared in said cause by their respective counsel and the defendants filed their answer, which the complainants are informed and believe was in substance a denial of the equity set up in the plaintiff's petition. The said cause came by legal continuances to the term of said court, held within and for the county of Taos, on the 29th day of May, 1865, when and where the respective parties again appeared and such proceedings were had, that an interlocutory decree was made and entered, in and by which it was in substance decreed and declared that in the lifetime of the said Charles Bent, the said Beaubien and Miranda held the legal title to one undivided fourth part of the said estate in trust for the said Charles Bent, who in equity was entitled to the said undivided one-fourth part thereof, that the said children of Charles Bent, upon the decease of their said father, had legal capacity to succeed to, and did succeed to the said equitable interest of their father in the premises as his only heirs-at-law.

And it was also adjudged and decreed that a partition should be made between the said children of Charles Bent and said Lucien B. Maxwell, who had succeeded to the interest and estate of the said Miranda, as also certain daughters and a son of the said Beaubien mentioned in the said decree, and the said Alfred, Teresina, and Estefana, children of the said Charles Bent, and in and by the said decree commissioners were appointed and directions given for making said partition, which said decree the complainants pray may be taken to be a part of this petition in the same manner as if the same were herein set forth at length, a copy of which is herewith filed and marked Exhibit "A."

The complainants further say that afterwards in the lifetime of the said Alfred Bent, to wit, on or about the — day of —, plaintiffs then all being in full life and all *sui juris*, and having full legal capacity to contract, and before any steps had been taken, to carry the said decree into execution, an agreement by way of a compromise of what was still regarded as a doubtful and uncertain claim on the part of the said complainants, was entered into by and between the said Lucien B. Maxwell and each of the said plaintiffs, whereby in consideration of the sum of eighteen thousand dollars to be paid by the said Maxwell to the said plaintiffs, they, the said plaintiffs and each of them agreed with the said Maxwell to release and discharge the premises and every part thereof, and also the said Maxwell and wife from the said trust or equitable claim, and in confirmation of such release and discharge to convey to him, the said Maxwell, all their right, title, and interest respectively, in and to the said premises; the sole object and purpose of the said agreement being to confirm the title to the said Maxwell and wife to the premises, and to release and discharge the same from the said trust or equitable claim set up by the plaintiffs.

The complainants further say that before the performance and full execution of the said agreement could be had, to

wit: on or about the — day of —, the said Alfred Bent, one of the plaintiffs, deceased at Taos, in said Territory, leaving three minor children and heirs, namely, the said Charles Bent, Julian Bent and Alberto Silas Bent.

That afterwards, at the term of the said court held in and for the county of Taos, on the 9th day of April, 1866, such proceedings were had in the said cause that the death of the said Alfred Bent was suggested upon the record and thereupon his said minor children and heirs, Charles, Julian and Alberto Silas, were made parties plaintiff, and their mother, Guadalupe Bent, widow of said Alfred Bent, was then and there appointed guardian *ad litem* for said minors respectively.

Thereupon such other proceedings were had and held that it was made to appear to the said court that the aforesaid agreement between the plaintiffs and Lucien B. Maxwell for the extinguishment of the said claim or trust had been made, and that in consequence thereof the said interlocutory decree for a partition had not been carried into effect and executed, and thereupon at the request and with the consent of the solicitors for the respective parties, plaintiff and defendant, it was further ordered by the said court that the interlocutory decree aforesaid declaring the said trust and equity in favor of the plaintiffs and directing a partition, and all orders made under and by virtue of the said decree should be and they were set aside. And it was then, upon like request and agreement, further ordered and decreed that the said Lucien B. Maxwell should pay to the plaintiffs in said suit the said sum of eighteen thousand dollars to be divided among them as follows, namely: To the said Scheurick and Teresina Bent, his wife, one-third thereof; to the said Hicklin and Estefana Bent, his wife, one-third thereof, and to and among 10 the said children of Alfred Bent, the remaining third part equally, the share of each to be paid into the hands of their said mother and guardian *ad litem*. And upon like request and agreement, it was then and there further ordered and decreed by the court, that the said Alexander Hicklin and Estefana Bent his wife, and the said Aloys Schuerick and Teresina Bent, his wife, and the said Guadalupe Bent, guardian *ad litem* as aforesaid in the name of said Charles, Julian and Alberto Silas Bent, should within 10 days from date of said decree severally execute and deliver to the said Lucian B. Maxwell good and sufficient conveyances of all their right, title, interest, etc., in the premises.

The complainants further say that afterwards, to wit, on or about the 3rd day of May, 1866, the said Lucien B. Maxwell paid the said sum of eighteen thousand dollars to the persons and in the proportions as directed by the said decree, except that the sum of six thousand dollars was paid to the said Guadalupe Bent, as administratrix of the said estate of the said Alfred Bent, and not as guardian *ad litem* for said infants, and on the 3rd day of May, 1866, the said Scheurick and wife, executed and delivered to the said Maxwell a conveyance of one-third interest in the premises, and on the 31st day of May the said Hicklin and wife executed and delivered to the

said Maxwell a conveyance of all their right, title, and interest in the premises, and on the — day of — the said Guadalupe Bent undertook to convey to the said Maxwell all the right, title and interest in the premises of the said minor children of Alfred Bent. To this decree and deeds, the plaintiffs also beg leave to refer from time to time as it shall become necessary, in the same manner as if the same were herein set out at length, certified copies—which are herewith filed and marked "B," "F," "G," and "H" and prayed to be taken as a part of this bill.

11 The complainants further say, that by the said agreement made between the said Lucien B. Maxwell and the plaintiffs in the suit aforesaid, in the lifetime of said Alfred Bent, one of the said plaintiffs, all of the equitable right, title and interest, if any, of the said Charles Bent, and of the said plaintiffs derived from the said Charles Bent, became and was transferred and vested in the said Lucien B. Maxwell, and extinguished, and the equitable right, title and interest, if any, of the said plaintiffs, and each of them, and all trusts, if any, existing in their favor, in the premises was, and is wholly extinguished and terminated, and the premises and every part thereof, and all persons holding the same or any part of parcel thereof became and were and are free and discharged of and from the said trust, or equitable interest or claim, if any, of the said plaintiffs in the premises.

The complainants further say that the said agreement was fully carried out in good faith by the said surviving plaintiffs, Teresina Bent and Estefana Bent, and their husbands, respectively, by the execution and delivery to the said Maxwell of the conveyance hereinbefore referred to, and so far as the same could lawfully be done under and by virtue of the said order and the conveyance of Guadalupe Bent in behalf of the said minor children of Alfred Bent, deceased, under and in pursuance of the same, the said trust or equitable interest or claim, if any, of the said Alfred Bent and his said minor children and heirs, was wholly terminated and extinguished, but the complainants say that they are advised that by reason of certain errors and irregularities in the proceedings in the aforesaid —, it is doubtful in law whether as against the said minor children and heirs of said Alfred Bent, it sufficiently appears that they have no equitable or other interest in the said premises, and that such

12 doubt creates a cloud upon the title to the premises which can only be removed by the interposition and decree of this court.

The complainants further say that among the errors and irregularities in the proceedings in said suit and which create a cloud upon the title to the premises are, as they are advised, the following, namely :

It does not appear (as the fact is) that an agreement for the sale of the equitable interest of the said Alfred Bent in the premises, was made between the said Lucien B. Maxwell and the said Alfred Bent, in the lifetime of the latter. That the said interlocutory decree should not have been set aside, but the same should have been modified.

That the money paid by the said Lucien B. Maxwell for the supposed equitable interest of the said Alfred Bent, and to extinguish the same should have been directed to be paid to the personal representatives of the said Alfred Bent, and not to the guardian *ad litem* of his minor children and heirs, and that upon such payment being made, the court should by a proper decree, have decreed and adjudged the said trust or equitable claim or interest to be extinguished, and that the premises and every part and parcel thereof should be held free and discharged of said trust, and that the court had no jurisdiction to order and decree a conveyance by the guardian *ad litem* of the said infants in the name of the said infants of any interest which they might appear to have in the premises.

The complainants further say that in fact the share of the said Alfred Bent in the said eighteen thousand dollars, namely, six thousand, has passed into the hands of the personal representatives of the said Alfred Bent, namely, the said Guadalupe Thompson, late Guadalupe Bent, and widow of the said Alfred Bent, but now the wife of said George Thompson, and Thomas Boggs, who on the —
 13 day of — duly was appointed administratrix and administrator of the said Alfred Bent by —.

The complainants further state that the said agreement between the said Lucien B. Maxwell and the said Alfred Bent, in his lifetime, Teresina Bent and Estefana Bent, and their respective husbands, has been fully performed by the said Lucien B. Maxwell, and the complainants are therefore entitled to hold the premises free and discharged from the said trust as well as against the heirs of the said Alfred Bent, deceased, as against all other persons.

In tender consideration of the premises, and inasmuch as said complainants are without complete and adequate remedy by the strict rules of the common law, they refer all these matters and things to your honor's court in chancery, where the same are properly cognizable and relievable, and ask that said defendants, and each of them, may be required, to the best of their information, knowledge, and belief, full, true, and perfect answers make to all and singular the allegations in this petition contained, and the premises being found for complainants, they pray.

1st. That your honor will order, adjudge and decree that the trust aforesaid be terminated and extinguished as against the defendants; that the defendants have no interest in or title to the premises, equitable or otherwise, and that the plaintiffs respectively shall hold the premises according to their respective interest therein, free and discharged of all trusts in favor of the defendants, and any and all persons claiming under them, and grant to the complainants such other and further relief as may be just and equitable.

May it please your honor to grant unto complainants *to writ of subpoena*, to be directed to Guadalupe Thompson, administratrix of Alfred Bent, deceased, and George Thompson, Julian Bent,

Charles Bent, and Alberto Silas Bent, commanding them and
 14 each of them, on a certain day, and under a certain penalty therein inserted, to appear at the next regular term of the

court for the county of Colfax, then and there to answer the premises and abide the order and decree of the court.

W. W. McFARLAND,
S. B. ELKINS,

Sols. for Comps.

And afterwards, to wit, on the 2nd day of September, A. D. 1870, the said complainants filed in the clerk's office of said district court, the following exhibit, marked "C," and referred to in the foregoing bill, which exhibit is in the words and figures following, to wit:

Seal third.

(Seal.)

Two rials.

For the years one thousand eight hundred and forty and one thousand eight hundred and forty-one.

MOST EXCELLENT SIR: The undersigned Mexican citizens and residents of this place, in the most approved manner required by law, state:

That of all the departments in the Republic, with the exception of the Californias, New Mexico is one of the most backward in intelligence, industry, manufactories, etc., and surely few others present the natural advantages to be found therein. Not only on account of its abundance of water, forests, woods, fertility of the soil, containing within its bosom rich and precious metals, which up to this time are useless for the want of enterprising men, who will convert them to the advantage of other men, all of which productions of nature are susceptible of being used for the benefit of society in the department as well as in the entire Republic, if they were in the hands of individuals who would work and improve them. An old and true adage says, "What is the business of all is the business of none," therefore, while the fertile lands in New Mexico, where, without contradiction, nature has proven herself most generous, are not reduced to private property, where it will be improved, it will be of no benefit to the department which abounds in idle people, who for want of occupation are a burden to the industrious portion of society, while with their labor they could contribute to its welfare, and honestly comply with their obligations. Idleness, the mother of vice, is the cause of the increase of crimes which are daily being committed, notwithstanding the severity of the laws and their rigid execution; the towns are overrun with thieves and murderers, who by this means alone desire to procure their subsistence. We think it a difficult task to reform the present generation, accustomed to idleness and hardened in vice. But the rising one, receiving new impressions, will easily be guided by the principles of a pure morality. The welfare of a nation consists in the possession of lands which produce all the necessities of life without requiring those of other nations, and it cannot be denied that New Mexico possesses this great advantage, and only requires industrious hands to make it a happy residence. This is the age of progress and the march of intellect, and they are so rapid that we may expect, at a

day not far distant, that they will reach even us. Under the above conviction, we both request Your Excellency to be pleased to grant us a tract of lands for the purpose of improving it without injury to any third party, and raising sugar-beets, which we believe will grow well and produce an abundant crop, and in time to establish manufactories of cotton and wool, and raising stock of every description. The tract of land we petition for to be divided equally between us, commences below the junction of the Rayado river with the Colorado, and in a direct line towards the east to the first hills, and from there running parallel with said river Colorado in a northerly direction to opposite the point of the "Una de Gato," following the same river along the same hills to continue to the east of said "Una de Gato" river to the summit of the table land (mesa), from thence turning northwest to follow along said summit until it reaches the top of the mountain, which divides the waters of the rivers running towards the east from those running west, and from thence following the line of said mountain in a southwardly direction until it intersects the first hill south of the Rayado river, and following the summit of said hill towards the east, to the place of beginning. For the reasons above expressed, and being the heads of large families, we humbly pray Your Excellency to take our joint petition under consideration, and be pleased to grant us the land we petition for, by doing which we will receive grace and justice. We swear it is not done in malice; we protect good faith and whatever may be necessary, etc.

Santa Fé, January 8th, 1841.

(Signed)

GUADALUPE MIRANDA.
CARLOS BEAUBIEN.

SANTA FÉ, *January 11, 1841.*

In view of the request of the petitioners, and what they state therein being apparent, this government, in conformity with law has seen proper to grant and donate to the individuals subscribed the land therein expressed in order that they may make the proper use of it which the law allows.

(Signed)

ARMIJO.

To Don Cornelio Vigil, justice of the peace :

The undersigned Mexican citizens and residents of this department appear before you in the most proper manner provided by law, and state that having received from the government of the department a grant to the public land set forth in the accompanying plat, as will be seen by the superior decree attached to the margin, and having no title of possession which will secure our legal property and prevent any one from disturbing us in it, we request you to consider us as having presented ourselves and without delay execute the same, to be used according to our rights.

We therefore request you to comply with our request, justice being what we impetrate.

We swear not to act with malice and in whatever may be necessary, etc.

Taos, February 12, 1843.

(Signed)

(Signed)

GUADALUPE MIRANDA.

CARLOS BEAUBIEN.

Taos, February 13, 1843.

Considered as presented and received as far as the law allows, I, the present justice, with those in my attendance and instrumental, will proceed to the place mentioned in the accompanying documents and let the possession solicited be given to the petitioners in order that it may be held by them, their heirs and successors, according to law, Citizen Cornelio Vigil, justice of the peace of the first demarcation of Taos, so provided, ordered, and signed with those in attendance, I certify.

(Signed)

Attending:

(Signed)

Attending:

(Signed)

CORNELIO VIGIL.

BUENAVA VALDEZ.

JUAN MANUEL LUCERO.

In the town of Taos, on the twenty-second day of February, one thousand eight hundred and forty-three, I, Citizen Cornelio Vigil, justice of the peace of this precinct, by virtue of what has been ordered in the foregoing decree, proceeded to the land referred to by Don Guadalupe Miranda and Don Carlos Beaubien in the foregoing petition and being there with those in my attendance and instrumental witnesses which for that purpose were appointed, we proceeded to erect the mounds according as the land is described in the accompanying petition, and which corresponds with the plat to which I attach my rubric; and commencing on the east of Red river, a mound was erected from whence following in a direct line in an easterly direction to the first hills, another mound was erected at the point thereof and continuing from south to north on a line nearly parallel with Red river, a third mound was erected on the north side of the Chico Rico or Chacuaco mesa (table-land), thence turning toward the west and following along the side of the said table-land of the Chacuaco to the summit of the mountain where the fourth mound was erected; from thence following along the summit of said main ridge from north to south to the Cuesta del Osha one hundred varas north of the road from Fernandez to the Laguna Negra, where the fifth mound was erected; from thence turning again to the east towards Red river and following along the southern side of the table-lands of the Rayado and those of Gonzalitos, on the eastern point of which the sixth mound was erected; from thence following in a northerly direction, I again reached Red river, on its western side, where the seventh and last mound was erected opposite to the first, which was erected on the eastern side, and being registered.

I took them by the hand, walked with them, caused them to throw earth, pull up weeds and show other evidences of possession with

which the act was concluded the boundaries being determined without any claim whatsoever to the injury of any third party, as I, the aforesaid justice in the name of the sovereignty of the nation (which may God preserve,) I gave the aforesaid Don G. Miranda and
 19 Don C. Beaubien, the perfect and personal possession asked for by them in order that it may answer as a sufficient title for them, their children and successors, in which I will protect and defend them, and I will direct that they be not deprived of said land without having been first heard and judgment rendered according to law. In testimony whereof I signed, with those in my attendance and instrumental witnesses, who were citizens Jose Maria Valdez, Pablo Jaramillo and Pedro Valdez (who were present) and residents of this precinct.

To which I certify.

(Signed)

CORNELIO VIGIL.

Instrumental:

(Signed) JOSE MARIA VALDEZ.

Instrumental:

(Signed) PABLO JARAMILLO.

Instrumental:

(Signed) PEDRO ANTONIO VALDEZ.

Attending:

(Signed) BUENAVA VALDEZ.

Attending:

(Signed) JUAN MANUEL LUCERO.

Seal fourth.

(Seal.)

Two reals.

For the year- one thousand eight hundred and forty-four and one thousand eight hundred and forty-five.

MOST EXCELLENT SIR: Citizen Charles Beaubien, a native of Canada, but naturalized and resident of this department in the jurisdiction of San Fernandez de Taos, for himself and in the name of his associate, D. Guadalupe Miranda, native of the Mexican Republic, appears before you with due respect, and in the most approved manner provided by law and convenient to him, and
 20 states that being about to undertake the cultivation of the lands which by virtue of a petition which we presented to the local government of this department on the 8th day of January, 1841, asking that the public lands at the place of "El Renion del Rio Colorado" be granted to us, including the Rayado and Ponie rivers, &c., and as there was no injury done to any third party, our petition was acceded to, as may be seen by the decree issued on the 11th day of January in the same year, by the most excellent governor and commandant, General Don Manuel Armijo, which is contained on the margin of our deeds. I have been prevented from carrying those projects into effect, on account of the decree of the 27th February last, issued by Your Excellency, and which through your secretary was communicated to the prefecture of the first dis-

trict, in order that paying attention to the petition addressed to Your Excellency by the curate Martinez and others in reference to a grant of lands made to the citizen of the United States, Mr. Charles Bent, and that all use made of them be suspended, I have to state to Your Excellency in defence of those lands which are in our possession according to the titles thereto which are in our possession, that the petition addressed to Your Excellency by the curate Martinez and others, is founded upon an erroneous principle, as the aforesaid Mr. Bent has not acquired any right to said lands, it is therefore very strange that the curate Martinez and others pretend to involve our property, as it has no connection with that of that individual; therefore it is to be presumed, or the necessary consequence must be, that the curate Martinez and his associates do not know to whom these lands belong, nor their intent, as he states that a large number of leagues were granted, when the grant does not exceed fifteen or eighteen, which will be seen by the accompanying judicial certificates.

21 They also state in the petition referred to, as I am informed, that those lands are recognized as commons where the stock of the towns is pastured; here is another error, when the same curate states that it is the place where buffaloes are hunted, very evidently making a palpable contradiction; he also states in his celebrated petition to the supreme government praying that the natives be not allowed to hunt that most abundant game for fear that the race would be extinguished on account of their unnecessary butchery at improper seasons, and it has removed so far that it takes several months to reach it, and being at so great a distance, can it be supposed that traveling at a moderate gait it can be reached in one or two days, therefore I believe their claim to the lands granted or assigned to Mr. Charles Bent is a fraudulent one, and as the claim is made against that individual, I do not see that we should be deprived of its productions our object being to place it under cultivation, and not only does the suspension of labor on those lands injure us, for the reason of having incurred heavy expenses, but also a considerable number of families and industrious men who are willing and ready to settle upon those lands, and to whom we have given lands, a list of which individuals I accompany in order that Your Excellency seeing their number may determine what may be proper, and even if it were beneficial to the entire department that

(Torn.)

In order that Your Excellency may determine if it is just or not I accompany the documents which attest our title, requesting that they be returned.

Therefore I pray Your Excellency that we be allowed to remain in the free use of our property, by which I will receive grace and justice, which I impetrate I swear it is not done in malice, etc.

Santa Fé, April 13, 1844.

(Signed)

CHARLES BEAUBIEN.

22

SANTA FÉ, *April 13, 1944.*

This office collecting all the proceedings in reference to the matter will refer these proceedings to the most excellent department assembly in order that it may give its opinion.

(Signed)

SENA.

(Signed)

JOSE Z ZUBIA.

MOST EXCELLENT SIR: In session of today this most excellent assembly in consideration of Your Excellency's decree has resolved upon the following opinion:

This most excellent assembly being informed of the petition of Mr. Charles Beaubien in which he states for himself and in the name of his associate, Miranda, that in consequence of an order issued by the most excellent governor, Don Mariano Chares, the free use and benefit of their possession was forbidden them, and that this was done on account of a petition made by the priest Martinez and the chief of the pueblo of Taos, falsely stating that this land was granted to Mr. Charles Bent and other foreigners, the aforesaid statement of the priest Martinez and associates being untrue, this assembly believing that the order of suspension having been based upon that false statement, and in view of the documents which accredit the legitimate possession of Miranda and Beaubien and their desires that their colony shall increase in prosperity and industry, for which purpose he has presented a long list of persons to whom they have offered land for cultivation, and who shall enjoy the same rights as the owners of the lands; that the government having dictated the step for the sole object of ascertaining the truth; that the truth having been ascertained and the right of the party established, is of the opinion that the aforesaid superior decree be declared null

and void and that Miranda and Beaubien be protected in their property as having been asked for and obtained according to law. This is our opinion, but Your Excellency may determine what you may deem most proper.

(Signed)

FELIPE SENA.

(Signed)

AUGUSTINE DURAN.

(Signed)

ANTONIO SENA.

(Signed) DONACIANO VIGIL, *Secretary.*

SANTA FÉ, *April 18, 1844.*

In view of the foregoing opinion of the most excellent assembly of the justice of the cause of the petitioner, for himself and his associate Miranda concerning the grant made to them by Governor General Manuel Armijo, and illegal petition of the curate Antonio Jose Martinez and the associates, in which they state that the land of the Rincon del Colorado were granted to foreigners the order of the 27th February issued by this government forbidding the free use of the land in question, is repealed, and Messrs. Beaubien and Miranda are fully authorized to establish their colony according to the offers made by them when they petitioned for the land which has been granted to them. Let this be transmitted to the prefect, in order that he may issue his orders in accordance with this decree.

In the absence of the secretary and by direction of H. E., the governor.

(Signed)

DONACIANO VIGIL,

Acting Secretary.

(Signed) SENA.

RIO ARRIBA, April 18, 1844.

Let the foregoing proceeding in which is to be found the superior decree of H. E., the governor of this department, dated the 18 inst., be transmitted to the party or parties interested in the land referred to, showing the documents to the justice nearest to the lands, 24 who is the proper one, in order that he may give ample authority to the petitioners to occupy the lands which has been granted to them. The prefect, in compliance with said decree, informs the justices that they are forbidden from hindering the parties interested in said lands.

(Signed)

ARCHULETA.

The undersigned certify, as far as the laws allows and to the best of our knowledge and belief, that there is no objection made to the settlement of the place called Red river, which embraces the Rayado and Ponie rivers, &c., it being well known and certain that it has never been used as pasture grounds for cattle, and that for a long time it has not been used for hunting buffalo; on the contrary the settlement of that place would be a benefit to the interior settlements, affording them protection from the enemy in that direction, occupying a great number of idlers who have no occupation, in the cultivation of the soil, and relieving this vicinity from a large number of persons who crowd us. The endless difficulties we experience every year on account of the scarcity of water for irrigation would be avoided; but the greatest advantage to the entire department would be that in case of a war with the Navajo Indians the stock could be pastured during the entire year in the vicinity of these new settlements, and be protected by them. It is also certain that from here to the Arkansas river, there are not more than six or seven days' journey, traveling with packs at a moderate pace, from there to Rayado one and one-half days' journey from the head of Red river to the Arkansas from three to four days.

In order that this certificate may have due force and effect, we pray the justice of the peace of this precinct to authorize this certificate and attach his judicial decree thereto at Taos, the 14th day of

March, 1844.

25 (Signed)

(Signed)

(Signed)

(Signed)

(Signed)

(Signed)

(Signed)

(Signed)

(Signed)

(Signed)

(Signed)

PABLO LUCERO.

BUENAVA VALDEZ.

BLAS TRUJILLO.

GREGORIO LUCERO.

JOSE MANUEL SANCHEZ.

JUAN MANUEL LUCERO.

JOSE MARIA VALDEZ.

JOSE IGNACIO LUNA.

TOMAS ROMERO.

JUAN BENITO VALDEZ.

JOSE GREGORIO MARTINEZ.

It passed before me and at the request of the subscribers thereto, by the authority which is conferred upon me by law, I authorize the present certificate, the contents thereof being true and in order that it may appear, I sign with those in my attendance, to which I certify in Taos, on the 18th March, 1844.

(Signed)

TOMAS LUCERO.

Attending:

(Signed)

RAFAEL CORDOVA.

Attending:

(Signed)

JUAN JOSE GONZALES.

Duplicate of the above certificate on the 16th March, 1844, signed by Miguel Antonio Vigil, Antonio Jose Mondragon, Miguel Mascarenas, Manuel Fernandez, Rinaldo Vargas, Jose Ignacio Gonzales, Jose Manuel Martinez, Pablo Vargas, Juan de Jesus Medina, Buenava Lobato.

At the request of the above signed personally present, I authorize the present certificate and I know the contents thereof to be true, and in order that it may so appear, I signed with those in my attendance to which I certify.

26

S. FERNANDO DE TAOS.

March 16, 1844.

(Signed) JUAN ANTONIO LOBATO.

Attending:

(Signed) JUAN DE LOS REYES ROMERO.

Attending:

(Signed) JOSE MATIS CURIAS.

(Endorsement:) File 48. Recorded in volume 1 of "Land Claim Record," in surveyor general's office of New Mexico, on pages 426, 427, 428, 429, 430, 431, 432, 433, 434 and 435. Dav. J. Miller, translator.

U. S. SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, TERRITORY OF NEW MEXICO, January 7, 1870.

I, T. Rush Spencer, the United States surveyor general within and for the Territory of New Mexico, do hereby certify that I have carefully compared the foregoing with the original among the papers on file in this office, constituting the Beaubien and Miranda grant (filed No. 48, reported No. 15) and find the same to be a correct, truthful and complete copy.

In witness whereof I have hereunto set my hand, (there being no official seal attached to this office). Done at Santa Fé, this 7th day of January, 1870.

(Signed)

T. RUSH SPENCER,

U. S. Surveyor General.

EXECUTIVE DEPARTMENT,
TERRITORY OF NEW MEXICO,
SANTA FÉ, January 8, 1870.

27

I, H. H. Heath, secretary of the Territory of New Mexico, do hereby certify that T. Rush Spencer, Esquire, who has

signed the foregoing document, is now, and was at the date of signing the same, the United States surveyor general of the Territory of New Mexico, duly commissioned as such; that his above signature is genuine, and that all his acts as such surveyor general are entitled to full faith and credence.

In testimony whereof I have hereunto set my hand and affixed the great seal of the Territory.

Done at Santa Fé this 8th day of January, A. D. 1870.

[SEAL.]

(Signed)

H. H. HEATH,

Secretary Territory New Mexico.

And afterwards, to wit: on the same day and year last aforesaid, the said complainants filed in the clerk's office of said district court the following exhibit, marked "D," which exhibit is in the words and figures following, to wit:

Beaubien and Miranda.

To the Honorable William Pelham, surveyor general of the Territory of New Mexico:

Your petitioners, Charles Beaubien and Guadalupe Miranda, original and present claimants of a certain tract of land hereinafter described, would respectfully state, that heretofore, to wit: in the year of our Lord one thousand eight hundred and forty-one, Manuel Armijo, then governor of said Territory, under the Mexican Republic, by virtue of his authority as such governor, and of the consent and approval of the departmental assembly of said Territory, did grant and concede unto your said petitioners a full and complete right and title to a certain tract of land situated in the county of Taos, in the northeastern part of said Territory, and of which legal possession was judicially given to your petitioners according to the laws and customs of the Mexican Republic, on the twenty-second day of February, A. D. 1843, (see exhibit of grant

28 in this case marked "A"), and bounded and described as follows: Commencing on the east of Red river, a mound was erected, from whence following in a direct line nearly parallel with Red river; a mound was erected on the north side of the Chacuaco mesa (table-land); thence turning towards the west and following along the side of the said table-lands of the Chacuaco to the summit of the mountains where the fourth mound was erected; from thence following along the summit of the main ridge from north to south to the Cuesta del Osho, one hundred varas north of the road, from Fernandez to the Laguna Negra, where the fifth mound was erected; from thence turning again to the east towards Red river and following along the southern side of the table-lands of the Rayado and those of the Gonzalitos on the eastern point of which the sixth mound was erected; from thence following in a northerly direction again to Red river on its western side, where the seventh and last mound was erected opposite to the first, which was erected on the eastern side of said river.

The manner and form in which the possession of said tract was given to your petitioners will fully appear by the documentary evidence herewith filed (marked "D") and prayed to be made a part of this petition.

Your petitioners further state that they have cultivated and improved portions of said land for the last twelve years whereby it has become of great value, and that they are still cultivating and improving the same by cultivation of land and the erection of houses.

That the said tract has never been surveyed, and they cannot therefore furnish any certain estimate of its contents. That a small portion only is fit for cultivation, and the balance, owing to its mountainous character and scarcity of water, being useless for any other purpose than that of pasturage.

29 That they do not know of any person or persons contesting or intending to contest their right or title to the said lands, or any part of them, and your petitioners therefore pray that said grant may be confirmed to them under the laws of the United States, and will ever pray, etc.

(Signed) HOUGHTON, WHEATON & SMITH,
For Petitioners.

(Endorsement :) File 48. Beaubien and Miranda. Claim to the Rayado grant petition. Recorded vol. 1 of "Land Claims Record," in the surveyor general's office of New Mexico, pages 413 and 414.
(Signed) Dav. J. Miller, translator.

U. S. SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, TERRITORY OF NEW MEXICO, *January 7th, 1870.*

I, T. Rush Spencer, the United States surveyor general, within and for the Territory of New Mexico, do hereby certify that I have carefully compared the foregoing with the original among the papers on file in this office, constituting the Beaubien and Miranda grant, (filed No. 48, reported No. 15) and find the same to be a correct, truthful and complete copy.

In witness whereof I have hereunto set my hand (there being no official seal attached to this office). Done at Santa Fé, this 7th day of January, A. D. 1870.

(Signed)

T. RUSH SPENCER,
U. S. Surveyor General.

EXECUTIVE DEPARTMENT,
TERRITORY OF NEW MEXICO,
SANTA FÉ, *January 8, 1870.*

30 I, H. H. Heath, secretary of the Territory of New Mexico, do hereby certify that T. Rush Spencer, Esquire, who has signed the foregoing document, is now, and was at the time of signing the same, the United States surveyor general of the Territory of New Mexico, duly commissioned as such; that his above signature is genuine, and that all his acts as such surveyor general are entitled to full faith and credence.

In testimony whereof I have hereunto set my hand and affixed the great seal of the Territory.

Done at Santa Fé this 8th day of January, A. D. 1870.

[SEAL.]

(Signed)

H. H. HEATH,
Secretary Territory of New Mexico.

(Claim No. 48.)

Charles Beaubien and Guadalupe Miranda.

This case was filed on the 23d February, 1857, and set for trial on the 28th of July.

On the 8th day of January, 1841, Charles Beaubien and Guadalupe Miranda petitioned Manuel Armijo, the civil and military governor of New Mexico, for a grant of land in the now county of Taos, commencing between the junction of the Rayado and Red rivers; from thence in a direct line to the east to the first hills; from thence following the course of Red river in a northerly direction to the junction Una de Gato with Red river; from whence following along said hills to the east of the Una de Gato to the summit of the table-land, mesa; from whence turning northwest, following said summit to the summit of the mountain which separates the waters of the rivers which run towards the east from those which run to the west; from thence following the summit of said mountain in a southerly direction to the first hill east of the Rayado river; from thence following along the brow of said hill to the place of beginning.

On the 11th day of January, 1841, Manuel Armijo, the governor aforesaid, in conformity with the laws, granted to the petitioners to make such use of as they saw proper.

On the 22d day of February, 1843, the parties were placed in possession of the land granted, by Cornelio Vigil, a justice of the peace of the first precinct of Taos, with all the solemnities required by law and custom.

On the 27th of February, 1844, this grant was suspended by a subsequent governor upon complaint made by one Priest Martinez of Taos, for several reasons contained in the statement made by Beaubien on the 13th of April, 1844, to Armijo, who had in the meanwhile been reappointed to the office of civil and military governor of the department.

On the 18th day of April, Armijo referred the statement of Beaubien, as well as the original petition, grant and judicial possession, to the departmental assembly for its action in the premises. This body reversed the order of February 27, and approved the grant made by Armijo in 1841, which is referred to the prefect of the first district by the governor to issue his directions to cause the parties to be reinstated in their possession, which order was issued by the prefect on the 18th of April, 1844. The papers acted upon in this case are the original duly authenticated by the testimony of competent witnesses. The grant having been confirmed by the departmental assembly, and been in the constant occupation of the

grantees from the date of the grant until the present time, as is proven by the testimony of witnesses, it is the opinion of this office that it is a good and valid grant, according to the laws and customs of the government of the Republic of Mexico, and the decisions of the Supreme Court of the United States, as well as the treaty of Guadalupe Hidalgo of the 2nd February, 1848, and is therefore confirmed to Charles Beaubien and Guadalupe Miranda, and is transmitted for the action of Congress in the premises.

32

WM. PELHAM,

Surveyor General.

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, *September 17th, 1857.*

(Endorsement:) File 48. Surveyor general's decision. Recorded in vol. 1 of "Land Claims Record," in the office of the surveyor general of New Mexico, on pages 438 and 439. Dav. J. Miller, translator.

U. S. SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, TERRITORY OF NEW MEXICO.
SANTA FÉ, *January 7, 1870.*

I, T. Rush Spencer, the United States surveyor general within and for the Territory of New Mexico, do hereby certify that I have carefully compared the foregoing with the original among the papers on file in this office, constituting the Beaubien and Miranda grant (filed No. 48, reported No. 15), and find the same to be a correct, truthful and complete copy.

In witness whereof I have hereunto set my hand (there being no official seal attached to this office). Done at Santa Fé, this 7th day of January, A. D. 1870.

T. RUSH SPENCER,
U. S. Surveyor General.

EXECUTIVE DEPARTMENT,
TERRITORY OF NEW MEXICO,
SANTA FÉ, *January 8, 1870.*

I, H. H. Heath, secretary of the Territory of New Mexico, do hereby certify that T. Rush Spencer, Esq., who has signed the foregoing document, is now and was at the date of signing the same, the
33 United States surveyor general of the Territory of New Mexico, duly commissioned as such; that his above signature is genuine, and that all his acts as such surveyor general are entitled to full faith and credence.

In testimony whereof I have hereunto set my hand and affixed the great seal of the Territory. Done at Santa Fé, this 8th day of January, A. D. 1870.

[SEAL.]

H. H. HEATH,
Secretary Territory of New Mexico.

And afterwards, to wit, on the same day and year last aforesaid, the said complainants filed in the clerk's office of said district court

the following exhibit, marked "E," and referred to in the foregoing bill of complaint, which said exhibit is in the words and figures following, to wit:

This indenture, made the thirtieth day of April, in the year of our Lord, one thousand eight hundred and seventy, between Lucien B. Maxwell, of Cimarron, in the county of Colfax, Territory of New Mexico, and Luz B. Maxwell, *née* Beaubien, his wife, parties of the first part, and the Maxwell Land Grant and Railway Company, a corporation duly created and organized under the laws of the Territory of New Mexico, party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of one million, three hundred and fifty thousand dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged from the same by these presents and other good and valuable considerations have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do

grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, its successors and assigns forever, all that certain tract or estate of land, with the mines or minerals of every sort thereon, and therein, and the buildings thereon erected, situate partly in the said county of Colfax, Territory of New Mexico, and partly in the county of Las Animas, in the Territory of Colorado, and heretofore known as the Beaubien and Miranda grant, but latterly known as the Maxwell estate, containing about two millions of acres of land, be the same more or less, for a more particular description thereof reference is had to the original grant from the government of Mexico to the said Beaubien and Miranda, to the act of Congress of the United States, passed in the year one thousand eight hundred and sixty, confirming the said grant, as grant No. 15, Statutes at Large, volume 12, page 71, and the official document referred to in the said act, and to the official survey, now in course of execution under the direction of the United States Government, deputy surveyor W. W. Griffin; reserving, however, from the said tract, the home ranch of cultivated land with the buildings thereon, (except the mill hereinafter referred to) supposed to contain about one thousand acres more or less; and also reserving an undivided one-half interest in the Montezuma mill, so called, being a quartz mill of thirty stamps, with its appurtenances. Excepting from this reservation of the said home ranch, and hereby conveying to the party of the second part the water power thereon, and the flouring mill thereon erected, and the land — which the said mill is built, together with so much of the land around adjoining the said mill and water power as may be necessary for the convenient and full and free use and enjoyment of the same, together with free and full right of way in any direction and at all times forever, to and from said water power and mill, over and across the said home ranch, to the said party of the second part,

35 its successors and assigns, and their officers, agents, and servants. Also, excepting from the operation of this conveyance such tracts of land, part of the said estate, hereby warranted not to exceed in the aggregate fifteen thousand acres, to the parties of the first part, have heretofore sold and conveyed by deed duly recorded on or prior to the twenty-fifth day of January, one thousand eight hundred and seventy. And also, two certain lots of land, one heretofore sold by the parties of the first part to one Peter Joseph, and one heretofore sold to one Valdez, conveyances to which two parcels it is supposed have not as yet been recorded, but which the parties of the first part hereby covenant to have forthwith duly recorded. Also, excepting the following mining interest, namely: one-half the Montezuma quartz lode so called, the said half being fifteen hundred feet by one hundred feet; one undivided sixth part of the Aztec lode, so called; eight discoveries of quartz lodes, each being fifteen hundred by one hundred feet, and the premises are also subject to six leases of placer claims, each being three hundred by three hundred feet; also, excepting twelve lots in Elizabethtown, the purchase-money for which the same have been sold, is, however, to be paid to the party of the second part. Excepting, also, about six lots of land in Cimarron City, deeds for which have been recorded since January, one thousand eight hundred and seventy; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining. And the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And, also, all the estate, right, title, interest, dower, right of dower, property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part of, in, and to the same and every part and parcel thereof with the appurtenances.

36 To have and to hold the above granted, bargained and described premises with the appurtenances unto the said party of the second part, its successors and assigns, to its and their own proper use, benefit and behoof forever.

And the said parties of the first part, for themselves, their heirs, executors and administrators do covenant, grant and agree to and with the said party of the second part, its successors and assigns, that the said parties of the first part at the time of the sealing and delivery of these presents, are lawfully seized in their own right of a good, absolute and indefeasible estate of inheritance in fee-simple, of and in all and singular the above granted, bargained and described premises, with the appurtenances; and have good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid. And that the said party of the second part, its successors and assigns shall, and may at all times hereafter, peaceably and quietly have, hold, use and occupy, possess and enjoy the above-granted premises and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said parties of the first part,

their heirs or assigns or any other person or persons lawfully claiming or to claim the same.

And that the same now are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of whatever nature or kind soever. And, also, that the said parties of the first part and their heirs and all and every other person or persons whomsoever, lawfully or equitably deriving any estate, right, title or interest of, in or to the herein-granted premises by from under or in trust for them, shall and will at any time or times thereafter upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, its successors and assigns make,

do and execute, or cause or procure to be made, done and
 37 executed all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted, in and to the said party of the second part, its successors and assigns forever, as by the said party of the second part, its successors or assigns, or its or their counsel, learned in the law shall be reasonably devised, advise- or required.

And the said parties of the first part and their heirs, the above described, are hereby granted and released premises and every part or parcel thereof, with the appurtenances, unto the said party of the second part, its successors and assigns against the said parties of the first part and their heirs and against all and every person or persons whomsoever, lawfully claiming or to claim the same, and will warrant, and by these presents forever defend.

In witness whereof the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

L. B. MAXWELL. [SEAL.]

LUZ B. MAXWELL. [SEAL.]

Scaled and delivered in presence of—the words “million three hundred and fifty thousands,” on 1st page hereof, being interlined before execution—as to Lucien B. Maxwell:

(Signed) NATHANIEL GILL.

(Signed) J. B. CHAFEE, witness for Luz B. Maxwell.

(Signed) G. M. CHILCOTT.

STATE OF NEW YORK, }
 City and County of New York, } ss:

Be it remembered that on this sixth day of July, A. D. one thousand eight hundred and seventy, before me, Nathaniel Gilt, a commissioner for the Territory of New Mexico in New York,

38 duly commissioned and sworn, personally appeared Lucien B. Maxwell, to me personally known to be one of the persons described in and who executed the foregoing instrument of writing as party thereto, and acknowledged that he executed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal this sixth day of July, A. D. 1870, at the city of New York.

[SEAL.]

(Signed)

NATHANIEL GILL,

Commissioner for New Mexico in New York.

TERRITORY OF NEW MEXICO, }
County of Colfax, } ss:

Be it remembered that on this the 23rd day of July, A. D. 1870, before me, John Lee, clerk of the probate court for said county, Territory aforesaid, personally appeared Luz B. Maxwell, to me personally known to be one of the person-described in, and who executed the foregoing instrument of writing, as party thereto, and acknowledged that she executed the same as her free and voluntary act and deed, for the uses and purposes therein mentioned; and she, the said Luz B. Maxwell, wife of the said Lucien B. Maxwell, having been informed by me of the contents of said instrument, acknowledged on an examination, separate and apart from her said husband, that she had executed the same free from any compulsion, or undue or illicit influence of her said husband, and that she is still satisfied therewith.

In testimony whereof I have hereunto set my hand and affixed my official seal, this 23rd day of July, in the year of our Lord one thousand eight hundred and seventy, at Elizabethtown, Colfax county, New Mexico.

(Signed)

JOHN LEE,

Clerk Probate Court.

39 TERRITORY OF NEW MEXICO, }
County of Colfax, } ss:

I, the undersigned, clerk of the probate court, and *ex officio* recorder for said county, Territory aforesaid, do hereby certify that the foregoing instrument of writing was received by me for record at 7 o'clock a. m., July 23d, A. D. 1870, and duly recorded in Deed Book "A," pages 146, 147, 148, 149 and 150, one hundred and forty-six, one hundred and forty-seven, one hundred — forty-eight, one hundred and forty-nine, and one hundred and fifty, of the records of Colfax county, New Mexico.

In testimony whereof I have hereunto set my hand and official seal this 27th day of July, A. D. 1870.

(Signed)

JOHN LEE,

[SEAL.]

*Clerk Probate Court and ex Officio Recorder**for Colfax County, N. M.*

TERRITORY OF COLORADO, }
County of Las Animas. }

I, L. M. Peterson, county clerk and recorder in and for the said county in the Territory aforesaid, do hereby certify that the within deed was filed in my office for record on this 2d day of August, A. D.

1870, at nine o'clock a. m., and duly recorded in volume No. 3, on pages Nos. 4, 5, 6, 7, 8, 9.

(Signed)

L. M. PETERSON,
County Clerk and Recorder.

And afterwards, to wit: on the thirtieth day of August, A. D. 1870, the complainants filed in the clerk's office of said district court the following exhibit marked "A" referred to in the foregoing bill, which exhibit is in the words and figures following, to wit:

Be it remembered that heretofore, to wit: at a special term
40 of the district court for the first judicial district of the Territory of New Mexico, begun and held within and for the county of Taos, on the 29th day of May, A. D. 1865, among other things the following proceedings were had, to wit:

United States District Court, County of Taos, September Term 1,
1865.

ALFRED BENT, ESTEFANA HICKLIN and ALEX-
ander Hicklin, Her Husband; Teresina Bent,
alias Teresa T. Bent, and Aloys Scheurick,
Her Husband, and also by Her Next Friend,
Ceran St. Vrain,

vs.

GUADALUPE MIRANDA, JOSEPH PEEY, LUZ BEAU-
bien and Lucien B. Maxwell, Her Husband,
and the said Maxwell, Leonor Beaubien, Petra
Beaubien and Jesus G. Abreu, Her Husband;
Teodora Beaubien and Frederick Miller, Her
Husband; Juana Beaubien and Joseph Clo-
thier, Her Husband, and Pablo Beaubien,
Minor, and the said Frederick Miller, His
Guardian, and Vidal Trujillo, the Husband of
the said Leonor Beaubien, Defendants.

Bill in Chancery
for Partition of
Real Estate.

And now on this day came the parties by their counsel, and this cause having been at a former term of this court heard upon the bill and amended bill, and the answer thereto, the supplemental bill and the answer, and the testimony herein on file, as taken in this cause, which cause was taken under advisement by the court as to the decree which should be made in the premises, and the court being fully advised, in consideration thereof, therefore, it is ordered adjudged and decreed by the court that the said complainants, Alfred Bent,
41 Estefana Hicklin, and Teresina otherwise Teresa T. Bent, be and are hereby declared to be the natural son and daughters of the said Charles Bent in the said bill mentioned, by him begotten upon and conceived and born of Ygnacio Jamarillo, within the Territory of New Mexico, formerly the department or province of New Mexico, and at the time the said Alfred, Estafana and Teresa were begotten and conceived, no lawful impediment existed to prevent the said

Charles Bent and Ygnacio Jamarillo from in due form of law solemnizing a contract of marriage, the one with the other; that as such natural children the said Alfred, Estefana and Teresa, in the absence of any child or heir born in wedlock to the said Charles Bent, became and were at the time of his decease the true and lawful heirs of his body in this Territory, with the full power, right and authority to inherit, succeed to and receive the estate, property, rights and interests of property of the said Charles Bent in the said Territory, and that as such children and heirs they are justly and lawfully entitled to have, maintain, receive, possess and enjoy all the rights, interest and estate which in law or equity belonged or pertained to the said Charles Bent at the time of his decease, of, in or to the lands, real estate or grant as described and set forth in the complainants' bill and the exhibit therein referred to, which description is as follows, to wit: Commencing below the junction of the Ryado river with the Colorado, thence in a direct line to the east to the first hills, and from thence running parallel with said Colorado river to the north, to a point in front of the junction of the Una de Gato with the said Colorado river, thence following said hills to the east of the said river of the Una de Gato, to the summit of the mesa, thence turning to the northeast along said summit, to the summit of the mountain that separates the waters that flow to the east from those that flow to the west, and from thence following the said mountain to the south of the first ceja, south of
42 the Ryado river, and from thence following the summit of said ceja, east to the place of beginning.

It is further ordered, adjudged and decreed that the said Charles Bent at the time of his decease was justly and equitably entitled and seized of one undivided fourth part of the estate in and to the said tract of land, real estate or grant, and that the said Charles Beaubien and Guadalupe Miranda were at said time so entitled and seized of an equal undivided share of the remaining three-fourths of the said tract or grant.

Furthermore, that the said Alfred, Estefana, and Teresina (alias Teresa T.), upon the decease of their said father, inherited, succeeded to and became seized of the said undivided one-fourth part interest and estate which belonged or pertained to the said Charles Bent in law and equity, in and to the land or real estate in the entire tract or grant aforesaid, at the time of his decease, and that the said Alfred Bent, Estefana and Teresina, are now fully and absolutely entitled to and seized of the undivided one-fourth part of the interest and estate of the said tract of land or grant.

Furthermore, that the said undivided one-fourth part in and to the said tract or grant of land or real estate be, and hereby is declared established and confirmed to them, the said Alfred, Estefana and Teresina (alias Teresa T.) and to their heirs and assigns forever, with the full and perfect right, powers and authority to possess and enjoy the same.

It is further ordered, adjudged and decreed that a just and equitable partition be made of the said tract of land or grant between the said Alfred, Estefana and Teresina, and the said daughters and

son of the said Charles Beaubien, deceased, defendants herein, and Lucien B. Maxwell, the assignee and grantee of the said Guadalupe Miranda, according to the rights, interests and estate hereinabove declared between the respective parties.

43 Furthermore, that the special commissioners hereinafter appointed to make and allot the said partition shall first take and subscribe an oath before the judge or the clerk of this court, the clerk of the probate for the country of Mora, or the justice of the peace within and for the precinct including the county-seat of said county to well and faithfully, without partiality, prejudicial favor or ill will, to the best of their knowledge, understanding, skill and abilities, make a partition and allotment of the said tract of land or grant, between the parties and in the manner or form prescribed and required in this decree, and the said oath so taken and subscribed shall be duly certified by the officer administering the same and by the commissioners, annexed to and returned with the report by them to be made to this court.

That when the oaths shall be so taken and subscribed, the said commissioners shall jointly proceed in person upon the said tract or grant and without any unnecessary delay, and shall inspect the same throughout its extent and especially the streams and springs of water and their capacities, one year with another to supply water for the purpose of irrigating the lands connected with or contiguous to the said streams, susceptible of cultivation and irrigation; the mines and minerals of whatsoever description; the quarries of rock or stones; timber for building, fencing and fire-woods; the lands suitable for plowing, planting and sowing; and grounds and — for pasturage.

They shall then make a partition of the said tract or grant, according to quantities, quality and value, and designate and describe the tracts or partitions divided by such descriptions, and natural and artificial objects, or marks or boundaries as shall remain plain and permanent and easily found. They shall part and lay off one-fourth part of the said tract or grant and divide, part and lay off the remaining three-fourths of the same into two equal parts.

44 In making the said partition of one-fourth and of the said three-fourths, regard shall be had to the buildings, acequias, cultivation and improvements made by the said Lucien B. Maxwell, upon the said tract or grant of land and nothing shall be credited to the other parties or charged and considered against the said Maxwell for any buildings, acequias, cultivation or improvements made and added to the said grant or tract of land by him or by persons holding and possessing by or through him in good faith. This shall have especial reference to the commencement of this suit upon the twelfth day of September, one thousand eight hundred and fifty-nine, and to the principal places and portions then occupied and improved by him and those by or under him. That in making and allotting the parts therein decreed, ordered and adjudged to be partitioned, the portions which shall be -portioned and allotted to the said Maxwell shall include the portions of said tract or grant, which the said Maxwell, or those under or through him, occupied and had

cultivated and improved before the commencement of the suit and since continued to occupy and improve, and the chief and principal portions, the said Maxwell has occupied and improved since the commencement of this suit.

In case the said Maxwell since the commencement of this suit has by himself or others in parts of said tract or grant remote from the principal farms and improvements actually occupied by him, made slight or temporary cultivation or improvements, which shall include the lands and waters in such manner as to leave not an equitable and just portion of the waters and cultivatable land to be parted to the other parties in this cause, then and in such case, the said remote land and waters included in such improvements or slight cultivations, shall in the partition to be made in this cause be considered and included in the said partition, the same as if the said improvements were not made upon the said lands. In

45 such case the commissioners shall assess the just and true value of the land covered by such improvements without their being added to the said lands, and also the said improvements by themselves exceeding the just and true value of them over and connected with the said lands and report the facts with their general report to this court, carefully noting the different assessed values, so that the court may decree justly and equitably concerning the same between the parties.

Furthermore, when the commissioners shall have parted the tract or grant of land as herein provided, they shall allot the one-fourth part to the said Alfred, Estefana and Teresa, (alias Teresa T.) Bent, and an equal portion of the said three-fourths, the one to the said Lucien B. Maxwell, and the other to the said son and daughters of the said Charles Beaubien, deceased.

In estimating the value of any improvements referred to herein, as made in certain remote places, and under the circumstances specified, the commissioners will also assess and report the value of the rents and profits since such places have been occupied and cultivated.

In parting and allotting to the said Maxwell the portion to be allotted to him, the said commissioners are hereby specially charged to estimate in the partition the lands which include the buildings, acequias, farms and other improvements by him made, or by others through or under him, in good faith, without reference to the value of any of the said improvements; that this provision does not extend to the aforesaid remote places and the improvements hereinbefore specially specified as connected therewith.

It is further ordered, adjudged and decreed that Lucien Stewart, of Taos county, and Vicente Romero and William Kroenig, of the county of Mora, in said Territory, be and they hereby are
46 appointed to execute and perform all the requirements and provisions of this decree, required of and to be done by commissioners, and that they make full, plain and exact report of their proceedings to the next term of this court.

Furthermore, it is ordered, adjudged and decreed that the said complainants pay to the said defendants, Maxwell and the said

daughters and son of the said deceased Charles Beaubien, the sum of one hundred dollars, the one-fourth part of the amount expended towards the procuring of the confirmation of the said tract or grant of land by the Government of the United States.

The court now reserves and suspend-making its decree as the partition and payment of the costs in this cause, until a future term of the court:

It appearing to the satisfaction of this court, upon the suggestion of the complainants, that since the last term of this court, Leonor Beaubien has been regularly and lawfully divorced from the bonds of matrimony before existing between her and the said Vidal Trujillo, it is ordered by the court that he be and hereby is dismissed from these proceedings, and that the clerk furnish a copy of this decree to the said Maxwell and also to the commissioners, and one for the said son and daughters, should these latter require the same, and that this cause stand continued until the next term of this court.

Signed June 3, 1865.

KIRBY BENEDICT,
Chief Justice.

47 & 48 And afterwards, to wit, on the same day and year last aforesaid, the complainants filed in the clerk's office of said district court the following exhibit, marked "B," referred to in the foregoing bill, which exhibit is in the words and figures following, to wit:

Be it remembered that at a regular term of the district court for the first judicial district of the Territory of New Mexico, begun and held within and for the county of Taos, on the 9th day of April, A. D. 1866, on the second day of said term, among other things the following proceedings were had, and were in the words and figures following, to wit:

ALFRED BENT and Others	}	No. 1. In Chancery.
<i>vs.</i>		
THE HEIRS OF CHAS. BEAUBIEN and Others.		

Now on this day came the complainants, by their counsel, and suggest to the court the death of Alfred Bent, one of the complainants herein, and moves the court for leave to make Chas. Bent, Julian Bent, and Alberto Silas Bent, his children and heirs, parties complainants herein, which said motion is granted by the court, and the said Chas. Bent, Julian Bent and Alberto Silas Bent are hereby made parties complainant to this bill of complaint.

And afterwards, to wit, on the fourth day of said term of said court, among other things the following proceedings were had, which are in the words and figures following, to wit:

ALFRED BENT and Others
 vs.
 THE HEIRS OF CHAS. BEAUBIEN and Others. } No. 1. In Chancery.

This cause stands continued until the next term of this court.

And afterwards, to wit, on the fifth day of said term of said court, among other things the following proceedings were had, which are in the words and figures following, to wit:

49 ALFRED BENT and Others
 vs.
 THE HEIRS OF CHARLES BEAUBIEN and Others. } No. 1. In Chancery.

By agreement of the parties, the continuance of this cause, made herein on a former day of this term of this court, is set aside, and on motion of solicitors for complainants, Guadalupe Bent — hereby appointed guardian *ad litem*, and commissioner in chancery, for the minors of Alfred Bent, in this cause, with full power to execute deeds, or carry into execution all sales or transfers made of their interest in and to the real estate therein described to Lucien B. Maxwell, one of the defendants in said cause, and this cause stands continued until the next term of this court.

And afterwards, to wit, at the September term of said court, 1866, begun and held on the 10th of said month of September, and on the 3rd day of said term of said court, among other things the following proceedings were had, which are in the words and figures following, to wit:

GUADALUPE BENT, Guardian *ad Litem* for
 Charles Bent, Julian Bent, and Alberto
 Silas Bent, Minor Heirs and Children of
 Alfred Bent, Deceased; Alexander Hicklin
 and Estefana Hicklin, His Wife; Aloys
 and Terisa Bent, His Wife,
 vs.
 LUCIEN B. MAXWELL, FREDERICK MILLER,
 Jesus G. Abreu, Executors of the Estate
 of Charles Beaubien, Deceased; Luz
 Beaubien and Lucien B. Maxwell, Her
 Husband; Leonor Beaubien, Teodora
 Beaubien, and Frederick Miller, Her
 Husband; Petra Beaubien and Jesus G.
 Abrieu, Her Husband; Juana Beaubien
 and Joseph Clothier, Her Husband, and
 Pablo Beaubien, by Frederick Miller, His
 Guardian. } No. 1. In Chancery.

50 In the District Court for the County of Taos, in Chancery
 Sitting.

Whereas an interlocutory decree was rendered at a former term of this court in the above cause, decreeing one-fourth of the land

mentioned in the petition herein to the complainants in this cause, and appointing commissioners to divide and set apart the portion so decreed, and whereas said interlocutory decree was never carried into effect, and whereas since the time of the rendition of said decree a mutual agreement has been made between the parties to this cause, settling and determining all the equities in the same:

It is therefore hereby ordered, adjudged and decreed by the mutual consent and agreement of the said complainants as well as of the said defendants in this cause, that the interlocutory decree above mentioned, together with all orders made under and by virtue of the same be set aside; and by the mutual consent and agreement of the said parties, it is hereby further ordered, adjudged and decreed that the said Lucien B. Maxwell, one of the defendants in this cause, pay to the said complainants the sum of eighteen thousand dollars, to be divided among them *per stirpes*, that is to the said Aloys Scheurick and Teresina Bent, his wife, one-third part, and to Alexander Hicklin and Estefana Bent, his wife, another third part, and to Charles Bent, Julian Bent and Alberto Silas Bent, the children and heirs of Alfred Bent, deceased, the remaining third part, to be equally divided among the said last named and to be paid into the hands of Guadalupe Bent, widow of the — Alfred Bent, deceased, and guardian *ad litem* for said children for the purposes of the said division.

And upon the further consent and agreement of the said parties, it is hereby further ordered, adjudged and decreed, that the said Alexander Hicklin and Estefana Bent, his wife, the said Aloys

51 Scheurick, and Teresina Bent, his wife, and the said Guadalupe Bent, guardian, *ad litem*, for Charles Bent, Julian Bent and Alberto Silas Bent, children and minor heirs of the said Alfred Bent, deceased, within ten days from the day of the date of this decree, make, execute and deliver to the said Lucien B. Maxwell good and sufficient deeds of conveyance of all their right, title, interest, estate, claim and demand of, in and to the lands in controversy in this cause; the said Guadalupe Bent, guardian *ad litem* as aforesaid, in the name of Charles Bent, Julian Bent and Alberto Silas Bent, minor heirs as aforesaid, and the said Alexander Hicklin and Estefana Bent, his wife, and the said Aloys Scheurick and Teresina Bent, his wife, in their own names. And by further consent and agreement between the said parties, it is hereby further ordered, adjudged and decreed, that the costs of this suit shall be paid, each of the said parties to pay the separate costs in the same made by themselves.

52 And afterwards, to wit, on the second day of September, A. D. 1870, the complainants filed in the clerk's office of said district court the following exhibit, marked "F," referred to in the foregoing bill, which exhibit is in the words and figures following, to wit:

This deed, made and entered into this third day of May, A. D. eighteen hundred and sixty-six, by and between Aloys Scheurick

and Teresina Scheurick, *née* Bent, his wife, of the town of Don Fernando de Taos, in the county of Taos, and Territory of New Mexico, parties of the first part, and Lucien B. Maxwell, of "El Cimarron," in the county of Mora, and Territory aforesaid, party of the second part, witnesseth, that the said parties of the first part for and in consideration of the sum of six thousand (\$6,000) dollars to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold, aliened, enfeoffed, conveyed and confirmed, as by these presents

53 they do grant, bargain and sell, alien, enfeoff, convey and confirm unto the said party of the second part, his heirs and assigns, the following-described real estate, situate, lying and being in the aforesaid county of Mora, and Territory of New Mexico, and known and described as the Rayado grant, heretofore granted to Charles Beaubien and Guadalupe Miranda by Governor Armijo, on the eleventh day of January A. D. 1841, and which is bounded and described as follows, to wit: Beginning on the east side of the Rio Colorado at a mound of rocks; thence running in straight line eastward to the first hills to another mound of rocks; thence continuing from south to north in a parallel line with the River Colorado to the third mound of rocks on the northern edge of the table-lands of Chicouca or Chacauco thence turning westwards and following the edge of the said table-lands of Chacauco, to the top or comb of the Sierra Madre, to the fourth mound of rocks; thence from the north to the south following the top of the Sierra Madre to the Cuesta del Osha, one hundred varas (100 v.) to the north of the road to Fernandez and to the Laguna Negra, to the fifth mound of rocks; thence turning anew to the east toward the Rio Colorado and following the southern edge of the table-lands of Rayado and Gonzolitos to the eastern point of these table-lands to the sixth mound of rocks, and thence following in a northerly direction until the said line strikes the Rio Colorado, on the western bank of said river, where the seventh mound of rocks was placed.

To have and to hold the one undivided one twelfth (one-12th) interest, of, in and to the above-described real estate, together, all and singular, the rights, immunities, hereditaments, privileges and appurtenances thereto belonging or in anywise appertaining unto the said party of the second part and his heirs and assigns forever; the said one-twelfth undivided interest being the entire interest, estate, claim and demand of the said Teresina Scheurick, *née*

54 Bent, of, in and to the real estate above described, as a child of and one of the heirs of Charles Bent, late of the Territory of New Mexico, deceased, and the said grantors, hereby covenant to and with the said grantee, his heirs and assigns, that the above-described interest hereby conveyed of, in and to the said real estate, is free and clear of all incumbrances, and that they, the said grantors, their heirs, executors and administrators shall and will warrant and defend the title to the same unto the said grantee, his heirs and assigns forever against the lawful claims or demands of all persons whomsoever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ALOYS SCHEURICK. [SEAL.]
TERESINA SCHEURICK *née* BENT. [SEAL.]

Signed, sealed and delivered in presence of—

ADOLPH LETCHER.
WM. G. BLACKWOOD.

TERRITORY OF NEW MEXICO, }
County of Taos, } ss :

Be it remembered that on this third day of May, A. D. eighteen hundred and sixty-six, before me, the undersigned, clerk of the court of probate, within and for the county aforesaid, personally came Aloys Scheurick and Teresina Scheurick, *née* Bent, his wife, who are both personally known to me to be the same persons whose names are subscribed to the foregoing deed of conveyance as parties thereto, and they severally acknowledged that they executed the same as their act and deed for the uses and purposes therein mentioned, and the said Teresina Scheurick, *née* Bent, having been by me first made acquainted with the contents of said deed upon an examination separate and apart from her said husband, acknowledged that she executed the same as her free and voluntary act and deed, without compulsion or undue influence of her said husband.

55 In witness whereof, I have hereunto set my hand and affixed the seal of the said court, the day and year last above written.

[Seal Probate Court, Taos Co.]

INOCENCIO MARTINEZ,
*Clerk of the Court of Probate for the
County of Taos, Territory of N. M.*

Filed at 3 o'clock p. m., January 16th, 1870.

J. LEE, *Clerk.*

TERRITORY OF NEW MEXICO, }
County of Colfax, } ss :

I, the undersigned, clerk probate court and *ex officio* recorder for said county, Territory aforesaid, do certify that the foregoing is a true and correct copy of the original deed as recorded in my office. Deed Book "A," pages 81 and 82.

Witness my hand and official seal, this first day of September, A. D. 1870.

[Seal Probate Court, Colfax Co., N. M.]

JOHN LEE,
Clerk Probate Court and ex Officio Recorder.

And afterwards, to wit, on the same day and year aforesaid, the complainants filed in the clerk's office of said district court the fol-

lowing exhibit, marked "G," referred to in the foregoing bill, which exhibit is in words and figures following, to wit:

(U. S. I. R. S. \$10.00. C. F., May 31st, 1866.)

This deed, made and entered into this 31st day of May, A. D. eighteen hundred and sixty-six, by and between Alexander Hicklin and Estefana Hicklin *née* Bent, his wife, of Greenhorn, in the county of Huerfano, and Territory of Colorado, parties of the first part, and Lucien B. Maxwell, of "El Cimarron," in the county of Mora, and

56 Territory of New Mexico, party of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of six thousand (\$6,000) dollars to them in land paid by the said party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold, aliened, enfeoffed, conveyed and confirmed, as by these presents they do grant, bargain and sell, alien, enfeoff, convey and confirm unto the said party of the second part, his heirs and assigns, the following-described real estate, situate, lying and being in the aforesaid county of Mora, and Territory of New Mexico, and known and described as the Rayado grant, heretofore granted to Charles Beau-bien and Guadalupe Miranda by Governor Armijo, on the eleventh day of January, A. D. 1841, and which is bounded and described as follows, to wit: Beginning on the east bank of the Rio Colorado, at a mound of rocks; thence running in a straight line eastward to the first hills to another mound of rocks, thence continuing from south to north on a parallel line with the River Colorado to the third mound of rocks on the northern edge of the table-lands of Chicouca O'Chacuaco, thence turning westward and following the edge of the said table-lands of Chacuaco to the *the* top or comb of the Sierra Madre, to the fourth mound of rocks; thence from north to south, following the top of the said Sierra Madre to the Cuesta del Osha, one hundred (100 v.) varas, to the north of the road to Fernandez and to the Laguna Negra to the fifth mound of rocks; thence turning anew to the east towards the Rio Colorado, and following the southern edge of the table-lands of Rayado and Gonzalitos to the eastern point of these table-lands to the sixth mound of rocks; and thence following in a northerly direction until the said line strikes the Rio Colorado on the western bank of said river, where the seventh mound of rocks was placed.

To have and to hold the one undivided one-twelfth (one-12th) interest of, in and to the above-described real estate, together
57 with all and singular the rights, immunities, hereditaments, privileges and appurtenances thereunto belonging, or in any-wise appertaining unto the said party of the second part, and his heirs and assigns forever, the said one-twelfth undivided interest, being the entire interest, estate, claim and demand of the said Estefana Hicklin *née* Bent, of, in and to the real estate above described, as a child of, and one of the heirs of Charles Bent, late of the Territory of New Mexico, deceased, and the said grantors hereby covenant to and with the said grantee, his heirs and assigns, that the above-described interest hereby conveyed of, in and to the said real

estate, is free and clear of all incumbrances, and that they, the said grantors, their heirs, executors and administrators, shall and will warrant and defend the title to the same unto the said grantee, his heirs and assigns forever, against the lawful claims or demands of all persons whomsoever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

A. HICKLIN. [SEAL.]
ESTEFANA HICKLIN. [SEAL.]

Signed, sealed and delivered in the presence of—

MATT. REDLINGER.
L. KICKABARGLE.

TERRITORY OF COLORADO, }
County of Huerfano. }

Be it remembered that on this thirty-first day of May, A. D. eighteen hundred and sixty-six, personally came before me, the undersigned, clerk of the court of probate, within and for the county aforesaid, Alexander Hicklin and Estefana Hicklin *née* Bent, his wife, who are both personally known to me to be the same persons whose names are subscribed to the foregoing deed of conveyance as parties thereto, and they severally acknowledge
58 that they executed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned; and the said Estefana, having been by me first made acquainted with the contents of the said deed, on an examination separate and apart from her said husband, acknowledged that she executed the same freely and voluntarily, and without compulsion or undue influence of her said husband.

In witness whereof I have hereunto set my hand and affixed the seal of said court, the day and year last above written.

GEORGE S. SIMPSON, [SEAL.]
Clerk of Probate Court.

No public seal provided.

Filed for record, 3 o'clock p. m., January 16th, 1870.

TERRITORY OF NEW MEXICO, }
County of Colfax, } 88 :

I, the undersigned, clerk of the probate court, and *ex officio* recorder of said county, Territory aforesaid, do hereby certify that the foregoing is a true and correct copy of the original deed as recorded in my office, Deed Book A, pages eighty-two, eighty-three and eighty-four, (82, 83 and 84).

In testimony whereof I have hereunto set my hand and official seal this first day of September, A. D. 1870.

[Seal Probate Court, Colfax Co., N. M.]

JOHN LEE,
Clerk Probate Court and *ex Officio* Recorder
Colfax County, New Mexico.

And afterwards, to wit, on the same day and year last aforesaid, the complainants filed in the clerk's office of the said district court, the following exhibit, marked "H," referred to in the foregoing bill, which exhibit is in the words and figures following, to wit:

59 (U. S. I. R. S. \$10,000, Taos, N. M., May 3, 1866.)

Know all men by these presents, whereas, I, Guadalupe Bent *née* Long, of the town of El Rancho, in the county of Taos, and Territory of New Mexico, and widow of Alfred Bent, late of the same place, deceased, by virtue of a decree and order of the district court of the United States of America, for the first judicial district, of the Territory of New Mexico, at the April term of said court, A. D. 1866, held within and for the said county of Taos, was appointed guardian *ad litem*, and commissioner in chancery for Charles Bent, Julian Bent and Albert Silas Bent, minor heirs of the said Alfred Bent, deceased, as aforesaid; and, whereas, the words of said decree and order of said court are as follows, to wit:

"Territory of New Mexico, First Judicial District Court, County of Taos, April Term, 1866.

ALFRED BENT and Others

vs.

THE HEIRS OF CHARLES BEAUBIEN and
Others.

} (No. —.) In Chancery.

"By agreement of the said parties, the continuance of the cause made herein on a former day of the present term of this court, is set aside, and on motion of solicitors for complainant, Guadalupe Bent is hereby appointed guardian *ad litem*, and commissioner in chancery for the minor heirs of Alfred Bent in this cause, with full power to execute deeds, or carrying into execution all sales or transfers made of their interest in and to the real estate therein described, to Lucien B. Maxwell, one of the defendants in said cause, and that this cause stand continued until the next term of this court," all of which proceedings so had as aforesaid, will

60 fully appear by the records of said court, to which reference is hereby made. Now, therefore, by reason of the premises, and by virtue of the power and authority on me conferred by the said decree, I, Guadalupe Bent, guardian *ad litem*, and resident as aforesaid, for and in consideration of the sum of six thousand (\$6,000) dollars to me in hand paid by the said Lucien B. Maxwell, of El Cimarron, of the county of Mora and Territory of New Mexico, the receipt of which is hereby acknowledged, have granted, bargained and sold, conveyed, confirmed and transferred, as by these presents, I do grant, bargain and sell, convey, confirm and transfer unto the said Lucien B. Maxwell, his heirs and assigns, the following-described real estate, situate, lying and being in the aforesaid county of Mora, and Territory of New Mexico, and known and described as the "Rayado grant," heretofore granted to Charles Beaubien, and Guadalupe Miranda by Governor Armijo, on the

eleventh day of January, A. D. 1841, and which is bounded and described as follows, to wit: Beginning on the east bank of the Rio Colorado at a mound of rocks, thence running in a straight line eastward to the first hills to another mound of rocks; thence continuing from south to north on a parallel line with the River Colorado to the third mound of rocks on the northern edge of the table-lands of Chicouca O'Chacuaco; thence running westward and following the edge of the said table-lands of Chacuaco to the top or comb of the Sierra Madre, to the fourth mound of rocks; thence from north to south, following the top of the said Sierra Madre to the Cuesta del Osha, one hundred (100 v.) varas, to the north of the road to Fernandez and to the Laguna Negra to the fifth mound of rocks; thence running anew to the east towards the Rio Colorado, and following the southern edge of the table-lands of Rayado and Gonzalitos to the eastern point of these table-lands to the sixth mound of rocks; and thence following in a northerly direction until the said line strikes the Rio Colorado on the western bank of said river, where the seventh mound of rocks was placed.

To have and to hold the one undivided one-twelfth (one-12th) interest, of, in and to the above-described real estate, together — all and singular, the rights, immunities, hereditaments, privileges and appurtenances thereunto belonging or in anywise appertaining unto the said Lucien B. Maxwell, and his heirs and assigns forever; the said one-twelfth undivided interest being the entire interest, estate, claim and demand of the said Charles Bent, Julian Bent and Alberto Silas Bent said minor heirs of their father, said Albert Bent, deceased, of, in and to the real estate as a child, and one of the heirs of Charles Bent, Senior, late of the Territory of New Mexico, deceased; and I, the said Guadalupe Bent, guardian *ad litem*, do hereby covenant to and with the said Lucien B. Maxwell, his heirs and assigns, that the above-described interest hereby conveyed of, in and to the said real estate, is free and clear from all incumbrances, and that I, my heirs, executors and administrators, shall and will warrant and defend the title to the same unto the said Lucien B. Maxwell, his heirs and assigns forever, against the lawful claims or demands of all persons whomsoever.

In witness whereof, I have hereunto set my hand and seal this third day of May, A. D. eighteen hundred and sixty-six.

GUADALUPE BENT NÉE LONG, [SEAL.]

Guardian ad Litem of Charles Bent,

Julian Bent, and Albert Silas Bent.

Signed, sealed and delivered in presence of—

ADOLPH LETCHER.

WM. BLACKWOOD.

TERRITORY OF NEW MEXICO, }
County of Taos, } ss :

Be it remembered that on the third day of May, A. D. eighteen hundred and sixty-six, personally came before me

the undersigned clerk of probate, within and for the county aforesaid, Guadalupe Bent *née* Long, who is personally known to me to be the same person whose name is subscribed to the foregoing deed of conveyance as party thereto, and she acknowledged that she executed the same as her free and voluntary act and deed, for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed the seal of the said court the day and year last above written.

[Seal Probate Court, Taos County, N. M.]

INOCENCIO MARTINEZ,
*Clerk of the Court of Probate for the County
of Taos, Territory of New Mexico.*

Filed at 3 o'clock p. m. January 16, 1870.

J. LEE, *Clerk.*

TERRITORY OF NEW MEXICO, }
County of Colfax, } ss.

I, the undersigned, clerk of the probate court and *ex officio* recorder for said county, Territory aforesaid, do hereby certify that the foregoing is a true and correct — of the instrument as recorded in my office. Deed Book "A," pages 78, 79, 80, and 81.

Witness my hand and official seal, this first day of September, A. D. 1870.

[Seal Probate Court, Colfax Co., N. M.]

JOHN LEE,
Clerk Probate Court and ex Officio Recorder.

63 And afterwards, to wit, on the first day of November, 1871, two of the said defendants, George W. Thompson and wife filed in the clerk's office of said district court their answer to said bill of complaint, which answer is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Colfax, } ss.

In the District Court, 1st Judicial District, March Term, 1872.

LUCIEN B. MAXWELL and THE MAXWELL LAND }
GRANT AND RAILWAY COMPANY *et al.* } In Chancery.
vs.
GUADALUPE THOMPSON *et al.*

The joint and several answer of Guadalupe Thompson and George W. Thompson (called in plaintiffs' bill George Thompson), husband of the said Guadalupe, two of the defendants, to the bill of complaint of Lucien B. Maxwell and Luz B. Maxwell, his wife, and the Maxwell Land Grant and Railway Company.

The respondents now and at all times hereinafter reserving all manner of benefit and advantage to themselves of exception to the

many errors and insufficiencies in said bill contained for answers thereunto so unto so much or such parts thereof as these respondents are advised as material for them to make answer unto. They answer and say that they admit that the Republic of Mexico granted unto Charles Beaubien and Guadalupe Miranda a tract of land as stated in complainants' bill and that the same was duly ratified by Congress, etc., but deny that they and those holding under them have ever since maintained and still maintain exclusive quiet 64 and peaceable possession thereof. Respondents deny that on the 29th day of May, A. D. 1865, (or at another time) the said Lucien B. Maxwell and wife had become and then were (or at any other time) the sole owners in fee-simple and undivided of the whole of the aforesaid granted premises with the exception of a few small parcels heretofore sold by them to other persons. And respondents know nothing in regard to certain deeds alleged by plaintiffs to have been executed subsequently to the said last-mentioned dates to the said Maxwell in confirmation of purchases previously made by him.

Respondents further say that they are strangers to and know nothing of their own knowledge of the sale and conveyance of Lucien B. Maxwell and his wife of the premises or grant aforesaid to the said Maxwell Land Grant and Railway Company, and therefore have complainants to make such proof thereof as they shall be able to produce. Respondents admit that about the time alleged in complainants' bill, Alfred Bent, since deceased, Estefana Hicklin and Alexander Hicklin, her husband, Teresa Bent (now Scheurick) and Aloys Scheurick, her husband, and also by her next friend, Ceran St. Vrain, commenced a suit in the district court of the said Territory of New Mexico, for the county of Taos, in the first judicial district, against the said Lucien B. Maxwell, and Luz Beaubien Maxwell, his wife, and sundry other persons as to whose interests in the object of this suit respondents are so advised. As to the loss of the pleadings in said suit, and complainants' search for the same, these respondents know nothing, nor do they know anything as to what was alleged in said proceedings, and pray that all the means in the power of this honorable court be used to find the said pleadings, and have them before this honorable court, or that complainants be held to make strict proof of the same. They admit, however,

65 that Charles Bent died intestate, and that the said Alfred Bent, deceased, Estefana Hicklin and Teresina Scheurick were the children and only heirs of the said Charles Bent, and that they were entitled equitably or otherwise to the one-fourth part of the aforesaid grant or tract of land; but as to the exact legal or equitable title, or how it was claimed and asserted in the pleadings in said cause, respondents are not advised otherwise than by complainants' bill, and the decree of partition rendered in said cause.

They admit, however, that the complainants in said cause prayed for a partition of the premises referred to in said cause upon the footing of the claim as set forth in their petition in said cause.

Respondents admit that the parties respectively appeared in said cause by their counsel, and that the defendants therein filed their answer, but as to the substance and import of said answer, respond-

ents are not advised, otherwise than by what still remains of the record in said cause.

Respondents admit that said cause came by legal continuance to the term held within and for the county of Taos, on the 29th day of May, 1865, when and where the respective parties again appeared as the record shows and that a decree was rendered, which for greater certainty is here referred to and a copy thereof herewith filed and marked Exhibit "A," and prayed to be taken as a part of the answer of these respondents.

Respondents further answering say, that as to what agreement the other parties to the said suit for partition may have made with the said Maxwell, they are not fully advised; but they wholly deny as they are advised and believe that the said Alfred Bent at any time after the rendering of said decree of partition and before his death, or at any other time was a party to any such agreement as alleged by complainant by way of compromise, sale or otherwise.

Respondents admit as stated in complainants' bill that
66 after the rendition of said decree of partition, the said Alfred Bent departed this life, to wit, on the ninth day of December, A. D. 1865, at Taos, in this Territory, and that he left three minor children and heirs, who respondents state are still minors and the only heirs of the said Alfred Bent, deceased, to wit, the said Charles Bent, of the age of eleven years, Julian Bent, of the age of nine years, and Alberto Silas Bent, of the age of seven years, being the same who are made parties defendant in plaintiffs' bill.

Respondents further answering say, that as to the proceedings alleged by complainants to have taken place at the term of the court held in and for the county of Taos, on the ninth day of April, 1866, they beg leave to refer to the record of said court for a full, perfect and more certain answer herein without admitting the validity and legality of the same, but as administratrix and administrator as alleged in complainants' bill protesting against the same as illegal, unjust and void as to the minor children aforesaid.

Respondents admit that the several payments in pursuance of said pretended decree were afterwards made as alleged by complainants to the said Estefana Hicklin and Teresina Scheurick and their husbands. As to the allegations of plaintiffs touching the supposed order or decree and the effect of the proceedings in this honorable court last above referred to, these respondents are not competent to answer, as they are advised that they are questions of law, wherefore they are all referred to this honorable court for its decision. They deny, however, that by said proceedings the minor heirs of Alfred Bent, deceased, were in any manner divested of any title either legal or equitable, they had at the time, in the said grant or tract of land.

These respondents admit that the said agreement was fully carried out in good faith by the said surviving plaintiffs, Teresina Bent, now
67 Sheurick, and Estefana Bent, now Hicklin, and their husbands so far as they were bound and affected by the same, by their respectively executing and delivering to the said Maxwell, the conveyances referred to in complainants' bill, and that

respondent Guadalupe Thompson, also acted in good faith in making the pretended deed on her part, but that she was wholly ignorant of her duties, obligations and responsibilities as guardian *ad litem*, of the minor children aforesaid, or as commissioner in chancery, to carry into effect, sales, etc., and wholly ignorant of the rights of the said minors in the premises; but as to whether the said trust, or equitable interest, or claim of the said Alfred Bent, and his said minor heirs, was wholly terminated and extinguished, or not, respondents are not competent to answer; these likewise being questions of law referable to this honorable court for decision; but they are advised that the said supposed deed of conveyance by the said Guadalupe Thompson was illegal and void, and wholly inoperative so far as the right and interests of the said minors are concerned.

Respondents deny that six thousand dollars have passed into the hands of the said Guadalupe Thompson from the said Maxwell, but admit that a portion of six thousand may have so passed, but whether it was paid to her as administratrix or guardian *ad litem*, she is and was at the time of said payment wholly ignorant.

Respondents know nothing of Thomas Boggs having ever been appointed administrator of the estate of the said Alfred Bent, deceased.

And these respondents deny all manner of unlawful combination, etc., without this, that there is any other matter or thing in the complainants' said bill contained material or necessary for these defendants to make answer unto and not herein, and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge or belief of these defendants.

68 All of which matters these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs, etc.

GUADALUPE THOMPSON,
GEORGE W. THOMPSON,
By S. M. BAIRD AND
GEORGE BOYLES,
Their Attorneys.

TERRITORY OF COLORADO, }
County of Las Animas. }

George W. Thompson, being duly sworn according to law, says that the above answer is true in substance, and in fact, except as to such matters as are stated upon information and belief, and he believes them to be true.

G. W. THOMPSON.

Subscribed and sworn to before me this twenty-fifth day of October, A. D. 1871.

[Las Animas Co., R. W. A., Notarial Seal.]

ALBERT W. ARCHIBALD,
Notary Public within and for the County of
Las Animas, in the Territory of Colorado.

And afterwards, to wit, on the same day and year last aforesaid, the said infant defendants, by their guardian *ad litem*, filed in the clerk's office of said district court, their answer to complainants' bill of complaint, which answer is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Colfax, } ss :

In the District Court, First Judicial District, Sitting in and for the County of Colfax, March Term, A. D. 1872.

LUCIEN B. MAXWELL and THE MAXWELL LAND }
GRANT AND RAILWAY COMPANY *et al.* }
vs. } In Chancery.
GUADALUPE THOMPSON *et al.* }

69 The answer of Charles Bent, Juliana Bent, and Alberto Silas Bent (infants under the age of twenty-one years, by George Boyles, their guardian *ad litem*), defendants, to the bill of complaint of Lucien B. Maxwell and Luz B. Maxwell, his wife, and the Maxwell Land Grant and Railway Company.

These defendants answering, by their said guardian, say that they are infants of the age of eleven, nine and seven years respectively and they therefore submit their rights and interest in the matters in question in this cause to the protection of this honorable court.

By GEORGE BOYLES,
Their Guardian ad Litem.

And afterwards, to wit, on the second day of December, A. D. 1871, the said complainants filed in the clerk's office of the said district court, their replication to the answer of Guadalupe Thompson, administratrix, and George W. Thompson, two of the defendants, which replication is in the words and figures following, to wit:

In the District Court for the County of Colfax, at the — Term, A. D. 1871.

LUCIEN B. MAXWELL, LUZ B. MAXWELL, and THE MAXWELL }
LAND GRANT AND RAILWAY COMPANY }
vs. }
GUADALUPE THOMPSON, Administratrix Estate of Alfred Bent, }
Deceased; George Thompson, Charles Bent, Juliana Bent, and }
Alberto Silas Bent. }

Replication of complainants to the answer of Guadalupe Thompson, administratrix, and George Thompson, defendants.

70 These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants, for replication

thereto *saith* that *he doth* and will ever maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and unsufficient in the law, to be replied unto by *this* repliant-, without that that any other matter or thing in the said answer contained, material or effectual in the law to be replied to and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied is true; all which matters and things *this* repliant- *is* ready to aver, maintain and prove, as this honorable court shall direct, and humbly pray, as in and by *his* said bill they hath already prayed.

S. B. ELKINS,
Attorney for Complainants.

And afterwards, to wit, on the twelfth day of December, A. D. 1871, complainants file in the clerk's office of said district court, their replication to answer of infant defendants by their guardian *ad litem*, which replication is in the words and figures following, to wit:

In the District Court for County of Colfax.

LUCIEN B. MAXWELL and LUZ B. MAXWELL, His Wife, and The Maxwell Land Grant and Railway Company	} In Chancery.
<i>vs.</i>	
GUADALUPE THOMPSON, Administratrix Estate of Alfred Bent, Deceased; George Thompson, Chas. Bent, Juliana Bent, and Alberto Silas Bent.	

Replication of complainants to answer of Chas. Bent, Juliana Bent, and Alberto Silas Bent, minors, by their guardian *ad litem*, George Boyles.

71 The repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants for replication thereunto, *saith* that they *doth* and will aver, maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by the said defendants; and that the answer of the said defendants is very uncertain, evasive and insufficient in the law, to be replied unto by *this* repliant- without that that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true, all which matters and things *this* repliant- *is* ready to aver, and humbly pray as in and by *his* bill *he* hath already prayed.

S. B. ELKINS,
Solicitor for Complainants.

72 And afterwards, to wit, on the fourth day of January, A. D. 1873, at chambers in the city of Santa Fé, before the Hon.

Joseph G. Palen, chief justice of said Territory, and judge of the first judicial district court, the following order was made and entered in above-entitled cause, in the words and figures following, to wit:

LUCIEN B. MAXWELL and LUZ B. MAXWELL, His Wife, and The Maxwell Land Grant and Railway Company	} Chancery.
<i>vs.</i> GUADALUPE THOMPSON, Administratrix, et als.	

Now came on to be heard the petition of said complainants for leave to amend their bill of complaint herein, as specified in said motion, and the same being now argued by Mr. Catron for the complainants, and by Mr. Tompkins for the defendants, and the court being sufficiently advised in the premises, sustains the prayer of said petition. It is therefore considered by the court that the said complainants have leave to amend their bill of complaint herein as specified in said petition, and the said defendants are ruled to answer such amendments to said bill in twenty days after the service of a copy of the same upon R. H. Tompkins, Esq., one of the solicitors of the said defendants.

And afterwards, to wit, on the eleventh day of January, A. D. 1873, the complainants filed in the clerk's office of said district court their amended bill, which amended bill is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, {
County of Colfax. }

In the District Court of the First Judicial District, Sitting in the County of Colfax, Territory of New Mexico, for Trial of Causes Arising under the Laws of the Territory, at the August Term, A. D. 1870.

73 To the Hon. Joseph G. Palen, chief justice of the supreme court of said territory and judge of the first judicial district court thereof, in chancery sitting:

Your petitioners, Lucien B. Maxwell, of Cimarron, in the county of Colfax and Territory of New Mexico aforesaid, and Luz B. Maxwell, his wife, and The Maxwell Land Grant and Railway Company, a corporation duly created, organized and established under the laws of said Territory of New Mexico and having an office and place of business at said Cimarron, bring this their bill of complaint against Guadalupe Thompson, late Guadalupe Bent, administratrix of the estate of Alfred Bent and her husband, George Thompson, Charles Bent, Juliana Bent and Alberto Silas Bent, the last three all being minors and all residents of the county of Las Animas, in the Territory of Colorado, and thereupon your orators complain and say that heretofore, to wit, on or about the eleventh day of January, A. D. eighteen hundred and forty-one the Republic

of Mexico, in due form of law, granted to Charles Beaubien and Guadalupe Miranda, citizens of said Republic, a tract of lands, situate in the then province or department of New Mexico, constituting a part of the said Republic, which tract of land was described as follows, namely: Commencing on the east of Red river, a mound was erected, from whence following in a direct line in an easterly direction to the first hills another mound was erected at the point thereof and continuing from south to north on the line nearly parallel with Red river, a third mound was erected on the north side of the Chicorica or Chocuaco mesa (table-land); thence turning towards the west and following along the side of said table-land of the Chacuaco to the summit of the mountain where the fourth mound was erected; from thence following along the summit of said main ridge from the north to the south, to the Cuesta del Osha, one hundred varas north of the road from Fernandez to the Laguna Negra, where the fifth mound was erected; from thence

74 turning again to the east towards Red river and following along the southern side of the table-lands of the Rayado and those of the Gonzalitos, on the eastern point of which the sixth mound was erected; from thence following in a northerly direction to the west side of Red river, opposit the first, where the last and seventh mound was erected, all of which will more fully appear by reference to certified copies of said grant and act of possession herewith filed and made a part of this bill and marked "C" and "D." That the said grant was duly accepted by the said grantees who thereupon immediately entered into possession of the premises, and the said grantees and those holding under them have ever since maintained, and still do maintain, exclusive, quiet and peaceable possession thereof.

That afterwards and on or about the twenty-first day of June, A. D. 1860, the said grant was duly ratified and confirmed by an act of Congress of the United States in pursuance of the provisions in that behalf of the treaty between the United States and Mexico, known as the treaty of Guadalupe Hidalgo. That by sundry conveyances and purchases and by inheritance, on the twenty-ninth day of May, A. D. 1865, the said Lucien B. Maxwell and wife had become and then were the sole owner in fee-simple, and undivided, of the whole of the aforesaid granted premises, with the exception of a few small parcels heretofore sold by them to other persons, who had no interest in the object of this suit, nevertheless subsequent to said last-mentioned date, certain deeds were executed to the said Maxwell in confirmation of purchases previously made by him, and if it should hereafter become necessary the complainants beg leave of the court to set forth more specifically and in detail the origin of the title of the said Maxwell and wife.

75 That afterwards, to wit, on or about the 30th day of April, A. D. 1870, the said Lucien B. Maxwell and wife being as aforesaid still seized and possessed of the said premises, for a valuable consideration sold and conveyed the premises to the said Maxwell Land Grant and Railway Company by a warranty deed with full covenants, reserving and excepting the home ranch so called,

consisting of about one thousand acres of land and certain other small parcels of land and mineral rights to which said deed, if it shall become necessary, the complainants beg leave to refer, as will appear by reference to a certified copy of said deed made a part of this bill and marked Ex. "E."

The complainants further say that heretofore, to wit, on or about the 12th day of September, 1859, Alfred Bent, then in full life but since deceased, Estefana Hicklin and Alexander Hicklin her husband, Teresina Bent, alias Teresa T. Bent, and Aloys Scheurick, her husband, and also by her next friend, Ceran St. Vrain, commenced a suit in the district court of the said Territory of New Mexico, for the county of Taos, in the first judicial district against the said Lucien B. Maxwell and Luz Beaubien Maxwell his wife, and sundry other persons who have now no interest in the object of this suit and who are therefore not made parties thereto.

The complainants further say that diligent search has been made for the pleadings in the said suit of Alfred Bent and others, but the said pleadings cannot be found among the records of this court or elsewhere, and the complainants therefore aver that the said pleadings are lost or destroyed, but the complainants are informed and believe and therefore aver, that in the petition in the said suit of Alfred Bent and others, it was in substance alleged that by a parole agreement made between one Charles Bent, the father of the said Alfred Bent, Estefana Hicklin, *née* Estefana Bent, Teresina Scheurick, *née* Teresina Bent, and the said original grantees, Charles

76 Beaubien and Guadalupe Miranda, the said Charles Bent became and was equitably entitled to one undivided fourth part of the aforesaid granted premises, and that to the extent of such undivided one-fourth part, the said Beaubien and Miranda and those holding under them were trustees of the legal title for the said Charles Bent in his lifetime, that no conveyance of the said undivided interest aforesaid had been made to the said Charles Bent in his lifetime, that the said Charles Bent died intestate, and that the said Alfred Bent, Estefana Hicklin and Teresina Scheurick were the children and only heirs of the said Charles Bent, and that the defendants to the extent that they, severally and respectively, held legal title to the premises or parts thereof, continued to hold such legal title in trust for said alleged children of Charles Bent to the extent respectively of one undivided fourth part, and among other things, the said complainants prayed for a partition of the premises upon the footing of the claim as set forth in said petition.

That the parties respectively appeared in said cause by their respective counsel and the defendants filed their answer, which the complainants are informed and believe was in substance a denial of the equity set up in the plaintiff's petition. The said cause came by legal continuances to the term of said court, held within and for the county of Taos, on the 29th day of May, 1865, when and where the respective parties again appeared and such proceedings were had, that an interlocutory decree was made and entered in and by which it was in substance decreed and declared that in the lifetime

of the said Charles Bent, the said Beaubien and Miranda held the legal title to one undivided fourth part of the said estate in trust for the said Charles Bent, who in equity was entitled to the said undivided one-fourth part thereof, that the said children of Charles Bent, upon the decease of their said father, had legal capacity to succeed to and did succeed to the said equitable interest of
 77 their father in the premises as his only heirs-at-law. And it was also adjudged and decreed that a partition should be made between the said children of Charles Bent and Lucien B. Maxwell, who had succeeded to the interest and estate of the said Miranda, as also certain daughters and a son of the said Beaubien, mentioned in the said decree, and the said Alfred, Teresina and Estefana, children of the said Charles Bent, and in and by the said decree commissioners were appointed and directions given for making said partition, which said decree the complainants pray may be taken to be a part of this petition in the same manner as if the same were herein set forth at length, a copy of which is herewith filed and marked Exhibit "A."

Amendment. The complainants further say that afterwards, in the lifetime of the said Alfred Bent, to wit, on or about the first day of October, A. D. eighteen hundred and sixty-five, plaintiffs then all being in full life, and all *sui juris*, and having full legal capacity to contract, and before any steps had been taken to carry the said decree into execution, an agreement by way of a compromise of what was still regarded as a doubtful and uncertain claim on the part of the said complainants, was entered into by and between the said Lucien B. Maxwell and each of the said plaintiffs, whereby in consideration of the sum of eighteen thousand dollars, to be paid by the said Maxwell to the said plaintiffs, they the said plaintiffs, and each of them, agreed with the said Maxwell to release and discharge the premises, and every part thereof, and also, the said Maxwell and wife from the said trust or equitable claim, and in confirmation of such release and discharge, to convey to him, the said Maxwell, all their right, title and interest respectively in and to the said premises, the sole object and purpose of the said agreement being to confirm the title of the said Maxwell and wife
 78 to the premises, and to release and discharge the same from the said trust or equitable claim set up by the plaintiffs.

The complainants further say that before the performance and full execution of the said agreement could be had, to wit: on or about the fifteenth day of December, A. D. eighteen hundred and sixty-five the said Alfred Bent, one of the plaintiffs, deceased, leaving three minor children and heirs, namely the said Charles Bent, Juliana Bent and Alberto Silas Bent. That afterwards, at the term of said court, held in and for the county of Taos, on the 9th day of April, 1866, such proceedings were had in the said cause, that the death of the said Alfred Bent, was suggested upon the record and thereupon his said minor children and heirs, Charles, Juliana and Alberto Silas, were made parties plaintiff and their mother Guadalupe Bent, widow of said Alfred Bent, was then and there appointed guardian *ad litem* for said minors respectively.

Thereupon such other proceedings were had and held that it was made to appear to the said court that the aforesaid agreement between the plaintiffs and Lucien B. Maxwell for the extinguishment of the said claim or trust had been made, and that in consequence thereof, the said interlocutory decree for a partition had not been carried into effect and executed, and thereupon at the request and with the consent of the solicitors for the respective parties, plaintiff and defendant, it was further ordered by the said court that the interlocutory decree aforesaid declaring the said trust and equity in favor of the plaintiffs and directing a partition, and all orders made under and by virtue of the said decree should be and they were set aside. And it was then, upon like request and agreement, further ordered and decreed that the said Lucien B. Maxwell should pay to the plaintiffs in said suit the said sum of eighteen thousand dollars to be divided among them as follows, namely: to the said Scheurick and Teresina Bent, his wife, one-third thereof, to the said

79 Hicklin and Estefana Bent, his wife, one-third thereof, and to and among the said children of Alfred Bent, the remaining third part equally, the share of each to be paid into the hands of their said mother and guardian *ad litem*, and upon like request and agreement, it was then and there further ordered and decreed by the court that the said Alexander Hicklin and Estefana Bent, his wife, and the said Aloys Scheurick and Teresina Bent, his wife, and the said Guadalupe Bent, guardian *ad litem*, as aforesaid, in the name of said Charles, Juliana and Alberto Silas Bent, should within ten days from the date of said decree severally execute and deliver to the said Lucien B. Maxwell, good and sufficient conveyances of all their right, title interest, etc., in the premises.

The complainants further say, that afterwards, to wit, on or about the 3d day of May, A. D. 1866, the said Lucien B. Maxwell paid the said sum of eighteen thousand dollars to the persons and in the proportion as directed by the said decree, except that the sum of six thousand dollars was paid to the said Guadalupe Bent as administratrix of the said estate of the said Alfred Bent and not as guardian *ad litem* for said infants, and on the 3d day of May, 1866, the said Scheurick and wife executed and delivered to the said Maxwell a conveyance of one-third interest in the premises, and on the 31st day of May, the said Hicklin and wife executed and delivered to

the said Maxwell a conveyance of all their right, title and interest in the "premises, and on the 3d day of May, eighteen hundred and sixty-six the"

said Guadalupe Bent undertook to convey to the said Maxwell all the right, title and interest in the premises of the said minor children of Alfred Bent. To this decree and deeds the plaintiffs also beg leave to refer from time to time as it shall become necessary in

80 the same manner as if the same were herein set out at length, certified copies of which are herewith filed and marked Exhibits "B," "F," "G" and "H," and prayed to be taken up as a part of this bill.

The complainants further say, that by the said agreement made between the said Lucien B. Maxwell, and the plaintiffs in the suit

aforesaid, in the lifetime of said Alfred Bent, one of the said plaintiffs, all of the equitable right, title and interest, if any, of the said Charles Bent, and of the said plaintiffs derived from the said Charles Bent, became and was transferred to and vested in the said Lucien B. Maxwell, and extinguished, and the equitable right, title and interest, if any, of the said plaintiffs, and each of them, and all trusts, if any, existing in their favor, in the premises was and is wholly extinguished and terminated, and the premises and every part thereof, and all persons holding the same or any part or parcel thereof became and were and are free and discharged of and from the said trust, or equitable interest or claim, if any, of the said plaintiffs in the premises.

The complainants further say that the said agreement was fully carried out in good faith by the said surviving plaintiffs, Teresina Bent and Estefana Bent, and their husbands, respectively, by the execution and delivery to the said Maxwell of the conveyance hereinbefore referred to, and so far as the same could lawfully be done under and by virtue of the said order and the conveyance of Guadalupe Bent in behalf of the said minor children of Alfred Bent, deceased, under and in pursuance of the same, the said trust or equitable interest or claim, if any, of the said Alfred Bent and his said minor children and heirs, was wholly terminated and extinguished, but the complainants say that they are advised that by reason of certain errors and irregularities in the proceedings in the suit aforesaid, it is doubtful in law whether as against the said minor children and heirs of said Alfred Bent, it sufficiently

81 appears that they have no equitable or other interest in the said premises and that such doubt creates a cloud upon the title to the premises, which can only be removed by the interposition and decree of this court.

The complainants further says that among the errors and irregularities in the proceedings in said suit, and which create a cloud upon the title to the premises are, as they are advised, the following, namely: It does not appear (as the fact is), that an agreement for the sale of the equitable interest of the said Alfred Bent in the premises was made between the said Lucien B. Maxwell and the said Alfred Bent in the lifetime of the latter. That the said interlocutory decree should not have been set aside, but the same should have been modified.

That the money paid by the said Lucien B. Maxwell for the supposed equitable interest of the said Alfred Bent, and to extinguish the same, should have been directed to be paid to the personal representatives of the said Alfred Bent, and not to the guardian *ad litem*, of his minor children and heirs, and that upon such payment being made, the court should by a proper decree have decreed and adjudged the said trust or equitable claim or interest to be extinguished, and that the premises, and every part and parcel thereof, should be held free and discharged of said trust, and that the court had no jurisdiction to order and decree a conveyance by the guardian *ad litem* of the said infants in the name of the said infants, of any interest which they might appear to have in the premises.

The complainants further say that in fact the share of the said Alfred Bent in the said eighteen thousand dollars, namely, six thousand, have passed into the hands of the personal representatives of the said Alfred Bent, namely, the said Guadalupe Thompson, late Guadalupe Bent, and widow of the said Alfred Bent, but now the wife of said George Thompson, "who, on the 12th day of April, A. D. eighteen hundred and sixty-six, was duly appointed administratrix of the estate of said Alfred Bent, by the Hon. Pedro Sanches, judge of the court of probate within and for the county of Taos, in the Territory of New Mexico."

The complainants further state that the said agreement between the said Lucien B. Maxwell and the said Alfred Bent, in his lifetime, Teresina Bent and Estefana Bent, and their respective husbands, has been fully performed by the said Lucien B. Maxwell, and that the complainants are therefore entitled to hold the premises free and discharged from the said trust, as well as against the heirs of Alfred Bent, deceased, as against all other persons.

In tender consideration of the premises, and inasmuch as said complainants are without complete and adequate remedy by the strict rules of the common law, they refer all these matters and things to your honor's court in chancery, where the same are properly cognizable and relievable, and ask that said defendants and each of them may be required to the best of their information, knowledge and belief, full, true and perfect answers make to all and singular the allegations in this petition contained and the premises being found for complainants they pray "that for the aforesaid errors of law apparent on the face of the said decree of the 10th of September, 1866, the same may be reviewed and reversed in the points herein complained of and further that your honor will order, adjudge and decree that the trust aforesaid be terminated and extinguished as against the defendants; that the defendants have no interests in or title to the premises equitable or otherwise, and that the plaintiffs respectively shall hold the premises according to the respective interest therein, free and discharged of all trusts in favor of the defendants and any and all persons claiming under them and grant to the complainants such other and further relief as may be just and equitable."

May it please your honor to grant unto complainants the writ of subpoena to be directed to Guadalupe Thompson, administratrix of Alfred Bent, deceased, and George Thompson, Julianio Bent and Charles Bent and Alberto Silas Bent commanding them and each of them, on a day certain, and under a certain penalty therein inserted, to appear at the next regular term of the court for the county of Colfax, then and there to answer the premises and abide the order and decree of the court.

W. W. McFARLAND,
S. B. ELKINS,
Solicitors for Complainants.

And afterwards, to wit: on the fifteenth day of February, A. D. 1873, the said defendants, Guadalupe Thompson and

George W. Thompson, filed in the clerk's office of said district court their answer to amended bill of complaint, which answer is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
First Judicial District, County of Colfax. }

District Court, March Term, 1873.

85 LUCIEN B. MAXWELL, LUZ B. MAXWELL, His Wife, and THE
 MAXWELL LAND GRANT AND RAILWAY COMPANY
 vs.

GUADALUPE THOMPSON and GEORGE W. THOMPSON, Her Husband,
 and Charles Bent, Juliana Bent, and Robert Silas Bent, Minor
 Children and Heirs to Alfred Bent, Deceased. }

The joint and several answer of the said Guadalupe Thompson and George W. Thompson, her husband, two of the defendants, to the aforesaid amended bill of complaint against these respondents and three minor children and heirs, as above mentioned.

These respondents having previously filed their answer to the original bill filed against them in the above-entitled cause, and the said complainants having since the filing of said answer, to wit: on or about the 4th day of January, A. D. 1873, obtained leave of the court to amend their said bill in several particulars, and leave to said respondents to answer to said amendments being also obtained, the said respondents to answer to said amendments, or to such of them as may require an answer, answering, say that they deny that on the third day of May, 1866, or at any other time, the said Guadalupe Bent (now Thompson) undertook to convey to the said Maxwell all the right, title and interest in the premises of the said minor children of Alfred Bent.

These respondents also deny that the said Guadalupe Bent (now Thompson) was, on the twelfth day of April, A. D. eighteen hundred and sixty-six, duly appointed administratrix of the estate of the said Alfred Bent by the Hon. Pedro Sanchez, judge of
 86 the court of probate within and for the county of Taos, in the Territory of New Mexico, all of which matters and things these respondents are ready to aver and prove as this court shall direct, and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

GUADALUPE THOMPSON AND
 GEORGE W. THOMPSON,

Her Husband,

By R. H. TOMPKINS, *Their Solicitor.*

And afterwards, to wit: on the day and year last aforesaid, the said infant defendants, by their guardian *ad litem*, filed in the clerk's office of said district court, their answer to amended bill aforesaid, which answer is in words and figures following, to wit:

TERRITORY OF NEW MEXICO, {
County of Colfax. }

In the District Court of the First Judicial District, Sitting in and for
the County of Colfax. In Chancery.

LUCIEN B. MAXWELL, LUZ B. MAXWELL, and THE MAXWELL }
LAND GRANT AND RAILWAY COMPANY }

vs.

GUADALUPE THOMPSON, GEORGE W. THOMPSON, CHARLES BENT, }
JULIANO BENT, and ALBERTO SILAS BENT. }

The answer of Charles Bent, Juliano Bent, and Alberto Silas Bent,
infants, by George Boyles, their guardian *ad litem*, to the amend-
ments to the bill of complaint in the above-entitled cause.

These defendants answering say, by their guardian *ad litem*, say
they are infants under the age of twenty-one years, and they
87 therefore submit their rights and interests in the matter in
question in this cause to the tender consideration and pro-
tection of this honorable court, and pray strict proof of the matters
and things in said bill and the amendments thereto contained.

CHARLES BENT,
JULIANO BENT, AND
ALBERTO SILAS BENT,
By GEORGE BOYLES,

Their Guardian ad Litem.

February 10th, 1873.

And afterwards, to wit: on the first day of March, A. — 1873, the
said complainants filed in the clerk's office of said district court,
their replication to the answers of said defendants, which replication
is in words and figures following, to wit:

In the District Court, First Judicial District, County of Colfax,
March Term, 1873.

LUCIEN B. MAXWELL *et als.* }
vs. }
GUADALUPE THOMPSON *et als.* }

The replication of Lucien B. Maxwell, Luz B. Maxwell, and the
Maxwell Land Grant and Railway Company to the answers of
Guadalupe Thompson, George W. Thompson, Charles Bent,
Juliana Bent, and Alberto Silas Bent, minors, etc., to the amend-
ments of the bill of complaint filed by complainants.

These repliants, saving and reserving to themselves all and all
manner of advantage of exception which may be had and taken to
the manifold errors, uncertainties and insufficiencies of the answer
of said defendants to said amendment of said bill of com-
88 plaint for replication thereunto, *saieth* that they *doth* and will
aver, maintain and prove their said bill to be true, certain

and sufficient in the law to be answered unto by the said defendants, and that the — said defendants are very uncertain, evasive and insufficient in the law to be replied unto by *this* repliant; without that that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, *transferred*, or denied, is true; all which matters and things these repliants are ready to aver, maintain and prove, as this honorable court shall direct, and humbly pray, as in and by said amended bill they have already prayed.

S. B. ELKINS,
Solicitors for Complainants.

89 And now to wit, on the day and year first aforesaid, the following decree is made and entered in this cause, which decree is in the words and figures following, to wit:

THE MAXWELL LAND GRANT AND RAILWAY COMPANY, Lucien B. Maxwell, and Luz B. Maxwell, His Wife,

vs.

GUADALUPE THOMPSON, Administratrix of the Estate of Alfred Bent, Deceased; George Thompson, Her Husband, and George Boyles, Guardian "*ad Litem*" of Charles Bent, Alberto Silas Bent, and Julian Bent.

45.

Chancery.

This cause coming on to be heard on the pleadings and proofs, upon reading the same, as also the stipulation heretofore filed in this cause, signed by the solicitors for the respective parties, and dated the eighth day of April, A. D. one thousand eight hundred and seventy-three, wherein and whereby it is agreed that the above-entitled cause be submitted on the pleadings, exhibits and proofs to the judge in vacation and that a decree in said cause may be entered in vacation and at chambers and that either should have the right to apply for and perfect an appeal to the supreme court of the Territory of New Mexico at any time after the entering of said decree, at chambers, and before the close of the next regular term of this court which shall be held in the county of Colfax in said Territory, and after hearing S. B. Elkins and Thomas B. Catron, solicitors for the complainants, and Messrs. Boyles and Thomkins, solicitors — the defendants, and on deliberation being had, it appears to the court, and the court doth find and declare that the decree of the district court for the county of Taos rendered on the tenth day of September, A. D. one thousand eight hundred and sixty-six, is erroneous so far as it sets aside the provisions of the interlocutory decree of said court, rendered on the twenty-ninth day of May, A. D. one thousand eight hundred and sixty-five, determining that Alfred Bent, Estefana Hicklin, and Teresina, otherwise Teresa T. Bent, were the natural children of Charles Bent, and became and were at the time of his decease the true and lawful heirs of his body in this Territory, with full power,

rights and authority to inherit, succeed to, and receive the estate, property, rights and interests of property of the said Charles Bent, in the Territory of New Mexico, and that as such children and heirs they were justly and lawfully entitled to have, maintain, recover, possess and enjoy all the rights, interest and estate which in law or equity belonged or pertained to the said Charles Bent at the time of his decease of, in or to the lands, real estate, or grant described and set forth in said interlocutory decree.

It is also erroneous, so far as it sets aside the provision of
91 said interlocutory decree, establishing that at the time of the decease of the said Charles Bent he was justly and equitably entitled to and seized of one undivided fourth part of the tract of land, real estate, or grant, described in said interlocutory decree.

It is also erroneous, so far as it sets aside the provisions of said interlocutory decree, whereby it is determined that the said Alfred, Estefana and Teresina Bent, upon the decease of the said Charles Bent, inherited, succeeded to and became seized of the said undivided one-fourth part, interest and estate, which belonged or pertained to the said Charles Bent, in law and equity, in and to the land or real estate, described in said interlocutory decree, and that the said Alfred, Estefana, and Ter-sina Bent, became and were fully and absolutely entitled to and seized of the undivided one-fourth part of the interest and estate of the said tract of land or grant.

It is also erroneous, so far as it sets aside the provisions of said interlocutory decree, whereby it determines, declares, establishes and confirms to the said Alfred, Estefana and Teresina Bent, the said undivided one-fourth part in and to the said tract or grant of land or real estate to them and to their heirs and assigns forever, with full and perfect right, power and authority to possess and enjoy the same.

It is also erroneous as far as it directs that the said Guadalupe Bent, guardian *ad litem* for Charles Bent, Julian Bent and Alberto Silas Bent, children and minor heirs of the said Alfred Bent, deceased, make, execute and deliver to the said Lucien B. Maxwell, good and sufficient deeds of conveyance of all right, title, interest, estate, claim and demand of, in and to the land named in said decree.

92 And it further appears to the court, and the court doth further find and declare, that *the* pending the original suit in which said decree of date, the tenth day of September, A. D. one thousand eight hundred and sixty-six was rendered, and after the death of Alfred Bent, an agreement by way of compromise was made by the adult parties thereto, for the settlement of the same; and that the terms of said compromise and agreement were considered advantageous to the said infants, and were accepted by the court for and on their behalf, as is evidenced by the decree attempting to carry into full effect the terms of said compromise.

And it also appears to the court, and the court doth find and declare, that the sums by the terms of said agreement the said Lucien B. Maxwell was to pay to the said infants, have been received by them or their mother for their benefit, whereby and by

reason of said agreement and compromise, all the equitable right, title, interest and claim of the said infants, Julian Bent, Charles Bent and Alberto Silas Bent in and to the premises in question, became and was wholly terminated and extinguished, and said lands and premises became and were thereby discharged from the trust, and the said trust terminated and extinguished.

It is therefore ordered, adjudged and decreed, and this court, by virtue of the power and authority therein vested, doth hereby order, adjudge and decree, that said decree of the district court for the county of Taos, rendered on the tenth day of September, A. D. one thousand, eight hundred and sixty-six, in so far as the same is hereinbefore declared to be erroneous, be and the same is hereby reversed, vacated and set aside.

93 It is further ordered, adjudged and decreed that the said premises be, and that they now are held and possessed by the said Maxwell Land Grant and Railway Company, free and discharged of any and all trusts, rights, title or interest in or to the same, in favor of or pertaining to the said Guadalupe Thompson, either in her own right, or as administratrix of the estate of the said Alfred Bent, deceased, the said George Thompson, her husband, the said Charles Bent, Alberto Silas Bent and Julian Bent, or any or either of them.

It is further ordered, adjudged and decreed, that the complainants pay the costs herein taxed at — dollars, as also the sum of six hundred dollars as a counsel fee to the guardian *ad litem* of the infant defendants herein, that sum having been agreed upon by the solicitors of the respective parties.

And afterwards, to wit: on the fourth day of September, A. D. 1873, the defendants filed in the clerk's office of said district court the following motion and affidavit for an appeal, which motion and affidavit are in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Colfax. }

District Court, August Term, 1873.

LUCIEN B. MAXWELL and WIFE and THE MAXWELL	} In Chancery.
LAND GRANT COMPANY	
vs.	
GUADALUPE THOMPSON; GEORGE THOMPSON, Her	}
Husband, <i>et al.</i>	

94 The defendants in the above-entitled cause, by their solicitors pray the court to grant them an appeal, in said cause to the supreme court of the Territory.

GEORGE BOYLES AND
R. H. TOMPKINS,
Solicitors for Defendants.

TERRITORY OF NEW MEXICO, }
County of Colfax, } ss:

George W. Thompson, one of the defendants in the above-entitled cause, being duly sworn, states that the appeal in the above cause is not taken for the purpose of vexation or delay, but because this affiant believes that the appellants are aggrieved by the judgment or decision of the court.

G. W. THOMPSON.

Sworn to and subscribed before me this 4th day of September, 1873.

R. J. PALEN, *Clerk.*

And afterwards, to wit: at a regular term of said district court, held within and for the county of Colfax aforesaid, on the day and year last aforesaid, on the sixth day of said term, the following was made and entered in this cause in the words and figures following, to wit:

THE MAXWELL LAND GRANT AND RAILWAY COM-
 pany, Lucien B. Maxwell, and Luz B. Maxwell,
 His Wife,

vs.

GUADALUPE THOMPSON, Administratrix of the
 Estate of Alfred Bent, Deceased; George Thomp-
 son, Her Husband, and George Boyles, Guardian
ad Litem of Charles Bent, Alberto Silas Bent, and
 Julian Bent.

45. Chancery.

95 On motion of Mr. Boyles, of counsel for defendants, it is ordered that an appeal be allowed from the decree rendered in the cause to the supreme court of the Territory, the defendants having filed the affidavit and security required by law.

And afterwards, to wit, on the same day and year last aforesaid, the defendants filed in the clerk's office of said district court their appeal bond, which bond is in the words and figures following, to wit:

Know all men by these presents, that we, George W. Thompson as principal, and F. P. Ernest and J. B. Dawson as securities, are held and firmly bound unto Lucien B. Maxwell and Luz B. Maxwell and the Maxwell Land Grant and Railway Company, in the penal sum of five hundred dollars, good and lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents.

The condition of the above obligation is such that whereas, in a certain cause pending in the district court for the county of Colfax and Territory of New Mexico on the chancery side of said court wherein Lucien B. Maxwell and Luz B. Maxwell, his wife, and The Maxwell Land Grant and Railway Company are complainants, and

Guadalupe Thompson and George W. Thompson, administratrix and administrator of the estate of Alfred Bent, deceased, and George Boyles, guardian *ad litem* of Charles Bent, Alberto Silas Bent and Julian Bent infants, are respondents, a decree was rendered on the eight day of April, A. D. 1873, by the judge of said court, from which said decree the said respondents hath prayed an appeal to the supreme court of the Territory of New Mexico; now, if the said respondents shall prosecute their said appeal with effect
 96 and without delay, and shall pay whatever judgment may be rendered against them for costs on the hearing or dismissal of said appeal, then this obligation to be null and void, otherwise to be and remain in full force and effect.

Witness our hands and scrolls as seals, this fourth day of September, A. D. 1873.

G. W. THOMPSON. [SEAL.]
 F. P. ERNEST. [SEAL.]
 J. B. DAWSON. [SEAL.]

DISTRICT COURT, }
County of Colfax. }

Personally appeared before me, this fourth day of September, A. D. 1873, G. W. Thompson, F. P. Ernest and John B. Dawson, to me personally known to be the persons who made and executed the foregoing bond and whose names are attached thereto, and severally acknowledge that they executed the same for the uses and purposes therein mentioned.

R. J. PALEN,
Clerk First Judicial District Court of New Mexico.

TERRITORY OF NEW MEXICO, }
First Judicial District, County of Colfax, } ss :

J. B. Dawson and F. P. Ernest, sureties on the foregoing bond, personally appeared before me this fourth day of September, A. D. 1873, and severally made oath that they are each householders in the county of Colfax, and worth the sum of five hundred dollars over and above all just debts and liabilities.

R. J. PALEN,
Clerk First Judicial District Court.

97

Part second.

Transcript of Record.

THE MAXWELL LAND GRANT AND RAILWAY }
 COMPANY and LUZ B. MAXWELL }
 vs. }

GUADALUPE THOMPSON, Administratrix of } Chancery. No. 356.
 the Estate of Alfred Bent, Deceased; George }
 W. Thompson, Her Husband; Charles Bent, }
 Juliano Bent, and Alberto Silas Bent. }

Be it remembered, that heretofore, to wit: on the 25th day of February, A. D. 1880, there was filed in the clerk's office of the first

(now fourth) judicial district court of the Territory of New Mexico a mandate which said mandate is in the words and figures as follows, to wit :

THE UNITED STATES OF AMERICA :

The President of the United States of America to the honorable the judge of the district court of the first judicial district — the Territory of New Mexico, Greeting :

Whereas lately in the district court of the first judicial district of the Territory of New Mexico, before you, or some hon. judge of said court, in a cause in chancery between The Maxwell Land Grant and Railway Company, Lucien B. Maxwell and Luz B. Maxwell his wife, complainants, and Guadalupe Thompson, administratrix of the estate of Alfred Bent deceased, George Thompson her husband, and George Boyles, guardian *ad litem* of Charles Bent, Alberto Silas

98 Bent and Julian Bent, respondents, wherein the judgment of the said district court entered in said cause on the fourth day of September, A. D. 1873, is in the words and figures, following, namely :

THE MAXWELL LAND GRANT AND RAILWAY
Company, Lucien B. Maxwell, and Luz B.
Maxwell, His Wife,

vs.

GUADALUPE THOMPSON, Administratrix of the
Estate of Alfred Bent, Deceased ; George
Thompson, Her Husband, and George
Boyles, Guardian *ad Litem* of Charles Bent,
Alberto Silas Bent, and Juliano Bent.

Chancery. No. 45.

This cause coming on to be heard on the pleadings and proofs, upon reading the same, as also the stipulation heretofore filed in this cause, signed by the solicitors for the respective parties, and dated the 8th day of April, A. D. one thousand and eight hundred and seventy-three, wherein and whereby it is agreed that the above-entitled cause be submitted on the pleadings, exhibits and proofs to the judge in vacation, and that a decree in said cause may be entered in vacation and at chambers, and that either should have the right to apply for and perfect an appeal to the supreme court of the Territory of New Mexico, at any time after the entering of said decree at chambers, and before the close of the next regular term of the court which shall be held in the county of Colfax in said Territory, and after hearing, S. B. Elkins and Thomas B. Catron, solicitors for the complainants, and Messrs. Boyles and Thompkins, solicitors for the defendants, and due deliberation being had ; it appears to the court and the court doth find and declare that the decree of the district court for the county of Taos, rendered on the tenth day of September, A. D. one thousand eight

99 hundred and sixty-six, is erroneous so far as it sets aside the provisions of the interlocutory decree of said court, rendered

on the twenty-ninth day of May, A. D. one thousand eight hundred and sixty-five, determining that Alfred Bent, Estefana Hicklin and Teresina Cothm (otherwise) Teresina T. Bent, were innatural children; and became and were at the time of his decease, the true and lawful heirs of his body in this Territory, with full power, rights and authority to inherit, succeed to and receive, the estate, property, rights and interests of property of the said Charles Bent in the Territory of New Mexico, and that as such children and heirs, they were justly and lawfully entitled to have, maintain, recover, possess and enjoy all the rights, interest and estate which in law or equity belonged or pertained to the said Charles Bent at the time of his decease, of, in and to the lands, real estate or grant described and set forth in said interlocutory decree.

It is also erroneous, so far as it sets aside the provisions of said interlocutory decree, establishing that at the time of the decease of the said Charles Bent, he was justly and equitable entitled to and seized of one undivided fourth part of the tract of land, real estate or grant described in said interlocutory decree.

It is also erroneous so far as it sets aside the provisions of said interlocutory decree, whereby it is determined that the said Alfred, Estefana and Teresina Bent, upon the decease of the said Charles Bent inherited, succeeded to and became seized of the said undivided one-fourth part interest and estate, which belonged or pertained to the said Charles Bent in law and equity in and to the land or real estate described in said interlocutory decree, and
 100 that the said Alfred, Estefana and Teresina Bent became and were, fully and absolutely entitled to and seized of the undivided one-fourth part of the interest and estate of the said tract of land or grant.

It is also erroneous, so far as it sets aside the provisions of said interlocutory decree, whereby it determines, declares, establishes and confirms to the said Albert, Estefana and Teresina Bent the said undivided one-fourth part in and to the said tract or grant of land, or real estate, to them, and to their heirs and assigns, forever, with full and perfect right, power and authority to possess and enjoy the same.

It is also erroneous, so far as it directs that the said Guadalupe Bent guardian *ad litem* for Charles Bent, Julian Bent and Alberto Silas Bent children and minor heirs of the said Alfred Bent, deceased, make execute and deliver to the said Lucien B. Maxwell good and sufficient deeds of conveyance of all right, title, interest, estate, claim and demand of, in and to the lands named in said decree.

And it further appears to the court, and the court doth further find and declare, that pending the original suit in which said decree of date the tenth day of September A. D. one thousand eight hundred and sixty-six was rendered, and after the death of Alfred Bent, and agreement, by way of compromise, was made by the adult parties thereto, for the settlement of the same; and that the terms of said compromise and agreement, were considered advantageous to the said infants, and were accepted by the court for and on their

behalf, as is evidenced by the decree attempting to carry into full effect, the terms of said compromise.

101 And it also appears to the court, and the court doth find and declare, that the sums, which by the terms of said agreement, the said Lucien B. Maxwell was to pay to the said infants, have been received by them or by their mother, for their benefit, whereby, and by reason of said agreement and compromise, all the equitable right, title, interest and claim of the said infants Julian Bent, Charles Bent, and Alberto Silas Bent in and to the premises in question, became and was wholly terminated and extinguished and said lands and premises became and were thereby, discharged from the trust, and the said trust terminated and extinguished.

It is therefore ordered, adjudged and decreed, and this court by virtue of the power and authority therein vested, doth hereby order, adjudge and decree that said decree of the district court, for the county of Taos, rendered on the tenth day of September, A. D., one thousand eight hundred and sixty-six, in so far as the same is heretofore declared to be erroneous, be, and the same is hereby reversed, vacated and set aside.

It is further ordered, adjudged and decreed, that the premises be, and that they now are held and possessed by the said Maxwell Land Grant and Railway Company free, and discharged of any and all trusts, right, title or interest in or to the same, in favor of or pertaining to the said Guadalupe Thompson, either in her own right, or as administratrix of the estate of the said Alfred Bent deceased; the said George Thompson, her husband, the said Charles Bent, Alberto Silas Bent and Julian Bent or any or either of them.

It is further ordered, adjudged and decreed that the complainants pay the costs herein, taxed at — dollars as also the sum of six hundred dollars as a counsel fee to the guardian *ad litem* of the
102 infant defendants herein; that sum having been agreed upon by the solicitors of the respective parties.

On motion of Mr. Boyles of counsel for defendants it is ordered that an appeal be allowed from the decree rendered in this cause to the supreme court of the Territory, the defendants having filed the affidavit and security required by law.

As by the inspection of the transcript of the record of the said district court, which was brought into the supreme court of the Territory of New Mexico, by virtue of an appeal, agreeably to the statute in such case made and provided fully and at large appears.

And whereas at the January term A. D. 1874 the said cause came on to be heard before the said supreme court, on the said transcript of record, when the decree of the said district court for the county of Colfax was affirmed with costs.

And whereas at the October term A. D. one thousand eight hundred and seventy-seven, the said cause came on to be heard before the Supreme Court of the United States, on an appeal from the said supreme court of the Territory of New Mexico, when it was ordered, adjudged and decreed, "that the decree of the supreme court of the Territory of New Mexico rendered in this cause, be and *was* reversed, with costs, and that the said appellants, recover against the

said appellees The Maxwell Land Grant and Railway Company *et al.*, two hundred and seventy-six dollars and eighty-nine cents for their costs herein expended, and have execution therefor." And it was further ordered "that this cause be and the same is hereby remanded to the said supreme court, with directions to allow the complainants to amend their bill as they shall be advised, and with liberty to the defendants to answer any new matter introduced therein, and that all the proofs in the case shall stand as proofs upon any future hearing thereof, with liberty to either party to take additional proofs upon any new matter that may be put in issue by the amended pleadings."

As by the mandate of the Supreme Court of the United States, fully and at large appears.

And whereas at the present January term, A. D. 1880, the said cause came again on to be heard, before the supreme court of the Territory of New Mexico, on the said mandate.

On consideration whereof, it is ordered and adjudged, that this cause be, and the same is hereby remanded for a rehearing, to the first judicial district court of this Territory sitting within and for the county of Colfax, that the same Maxwell Land Grant and Railway Company be allowed to amend its bill as it shall be advised, and file the same in the said first judicial district court, and with liberty to the said defendants or either of them to answer any new matter introduced in said amended bill. It is further ordered that all the proofs in the cause shall stand as proofs on the future hearing with liberty to either party to take additional proofs, upon any new matter that may be put in issue by the amended pleadings.

January 20th, A. D. 1880.

You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the Territory of New Mexico ought to be had, the said appeal notwithstanding.

Witness the Hon. L. Bradford Prince, chief justice of the supreme court of the Territory of New Mexico, and the seal of said court the 26th day of January A. D. 1880.

[SEAL.]

JNO. H. THOMSON,

Clerk Supreme Court, Territory of New Mexico.

Cost of app-leants in Supreme Court of U. S. \$276.89 ; costs supreme court, Territory of New Mexico, Jan. 1880, clerk \$13.90.

At a regular term of the district court of the first (now fourth) judicial district of the Territory of New Mexico begun and held within and for the county of Colfax, at the court-house in the town of Cimarron, on the fourth Monday of March, in the year of our Lord, one thousand eight hundred and eighty, the same being the 22nd day of March, A. D. 1880.

Present : The Honorable L. Bradford Prince, chief justice of the supreme court of the Territory of New Mexico and judge of the district court of the first judicial district of said Territory ; F. W.

Clancy, clerk of said district court; Peter Burleson, sheriff of said county.

And on the third day of said term, the same being Wednesday, March 24th, A. D. 1880, the following among other proceedings were had, to wit:

TERRITORY OF NEW MEXICO, }
County of Colfax, } ss:

In the District Court for the County of Colfax, Sitting for the Trial of Causes Arising under the Laws of the Territory, 105 First Judicial District. In Chancery.

At the regular term of the said district court, held pursuant to law, at the court-house in Cimarron in said county of Colfax, on the 24th day of March, A. D. 1880.

THE MAXWELL LAND GRANT AND RAILWAY COMPANY,	}	
LUCIEN B. MAXWELL, and LUZ B. MAXWELL, His Wife,		
vs.		
GUADALUPE THOMPSON, Late GUADALUPE BENT, Admin-istratrix of the Estate of Alfred Bent, Deceased, and George Thompson, Her Husband, and Charles Bent, Juliano Bent, and Alberto Silas Bent, Infants, by George Boyles, Their Guardian <i>ad Litem</i> .	}	No. 92.

On reading and filing the mandate of the supreme court of the Territory of New Mexico, by which this action, heretofore taken by appeal from this court to the said supreme court, is remanded to this court, with directions to allow the complainants to amend their bill as they shall be advised, and with liberty to the defendants or either of them to answer any new matter introduced therein; and that all the proofs in the cause shall stand as proofs upon any future hearing thereof, with liberty to either party to take additional proofs upon any new matter that may be put in issue by the amended pleadings.

And upon hearing Mr. Lucien Birdseye and Mr. Thomas B. Catron, of counsel for the said complainants, and Mr. H. Meriam, Mr. C. Geaman, and Mr. William D. Lee, of counsel for the said defendants; and this court being fully advised in the premises.

106 It is hereby considered, ordered and adjudged that the said judgment of the said supreme court of the Territory of New Mexico be and the same is thereby made the judgment of this court; and that the judgment or decree heretofore rendered in said action in this court be and the same is hereby reversed with costs; and that the said complainants be and they hereby are allowed to amend their bill of complaint as they shall be advised, and that the said defendants or either of them shall have liberty to answer any new matter which shall be introduced in said amended bill; and that all the proofs in the case shall stand as proofs upon any future hearing thereof, and that either party shall have liberty to take additional proofs upon any new matter

that may be put in issue by the amended pleadings; and that this action here, do settle and proceed in this court, in accordance with the provisions of said mandate and law.

107 And on the day and year last aforesaid there *was* filed in said clerk's office amendments to bill of complaint which are in the words and figures as follows, to wit :

TERRITORY OF NEW MEXICO, }
County of Colfax, } ^{ss :}

In the District Court of the First Judicial District, Sitting in the County of Colfax, Territory of New Mexico, for the Trial of Causes Arising under the Laws of the Territory.

THE MAXWELL LAND GRANT AND RAILWAY COMPANY, LUCIEN B. MAXWELL, and LUZ B. MAXWELL, His Wife,

VS.

GUADALUPE THOMPSON, Late GUADA. BENT, Administratrix of the Estate of Alfred Bent, Deceased, and George Thompson, Her Husband, and Charles Bent, Juliano and Alberto Silas Bent, Infants, by George Boyles, Guardian *ad Litem*.

To the Hon. L. Bradford Prince, chief justice of the supreme court of said Territory, and justice of the first judicial district court thereof, in chancery sitting :

And now the said plaintiffs by special leave of the court first had and obtained, and in accordance with the mandate of the
108 supreme court of this Territory, filed herein, amend their bill of complaint in this action as heretofore amended, and upon which this action was heretofore heard, in this court, and which is exhibited in the transcript of record on the appeal in said action to the Supreme Court of the United States, whereupon this cause has been remanded to this court, in the manner following to wit :

First. In that part of said amended bill which appears in print 1 page 53, original page 161, in said Transcript of Record, after the words, " a copy of which is herewith filed and marked 'Exhibit A' the complainants further say that afterwards," strike out the following words, namely ; " In the lifetime of the said Alfred Bent, to wit : on or about the first day of October, A. D., eighteen hundred and sixty-five, plaintiffs then all being in full life and all *sui juris* and having full legal capacity to contract."

Second. In that part of said amended bill which appears in printed page 53, original page 161, in said Transcript of Record, after the words, " by way of a compromise of what was still regarded as a doubtful and uncertain claim on the part of the said complainants was entered into," strike out the words namely : " by and between the said Lucien B. Maxwell and each of the said plaintiffs."

Third. In that part of said amended bill which appears in printed page 53, original page 161, in said Transcript of Record,

after the words, "eighteen thousand dollars to be paid by the said Maxwell," strike out the following words namely: "to the said plaintiffs, they, the said plaintiffs and each of them;" and in place thereof insert the following words namely: "Plaintiffs."

109 Fourth. In that part of said amended bill which appears in printed page 54, original page 162 in said Transcript of Record, after the words, "The complainants further say that," strike out the following words, namely: "Before the performance and full execution of the said agreement could be had to wit."

Fifth. In that part of said amended bill which appears in printed page 55, original page 166, in said Transcript of Record, after the words, "The complainants further say that by the said agreement made between the said Lucien B. Maxwell and the plaintiffs in the suit aforesaid," strike out the following words, namely: "in the lifetime of the said Alfred Bent, or of the said plaintiffs."

Sixth. In that part of said amended bill which appears in printed page 55, original page 167, in said Transcript of Record, after the words "but the complainants say that they are advised that," strike out the following words, namely: "by reason of certain errors and irregularities."

Seventh. In that part of said amended bill which appears in printed page 55, original pages 167, 168 and 169 in said Transcript of Record, strike out the paragraph in the words and figures following that is to say: "The complainants further say that among the errors and irregularities in the proceedings in said suit, and which create a cloud upon the title to the premises are, as they are advised, the following, namely: it does not appear as the fact is that an agreement for the sale of the equitable interest of the said Alfred Bent in the premises was made between the said Lucien B. Maxwell and the said Alfred Bent, in the lifetime of the latter; that the said interlocutory decree should
110 not have been set aside, but the same should have been modified, that the money paid by the said Lucien B. Maxwell for the supposed equitable interest of the said Alfred Bent, and to extinguish the same should have been directed to be paid the personal representatives of the said Alfred Bent, and not to the guardian *ad litem* of his minor children and heirs, and that upon such payment being made the court should, by a proper decree, have decreed and adjudged the said trust, or equitable claim or interest, to be extinguished, and that the premises and every part and parcel thereof, should be held free and discharged of said trust, and that the court had no jurisdiction to order and decree a conveyance by the guardian *ad litem* of the said infants, in the name of the said infants, or any interest which they might appear to have in the premises."

Eighth. In that part of said amended bill which appears in printed page 56, original page 170, in said Transcript of Record, after the words, "The complainants further state that the said agreement," strike out the following words, namely: "between the said Lucien B. Maxwell and the said Alfred Bent, in his lifetime, Teresina Bent and Estefana Bent, and their respective husbands."

Ninth. In that part of said amended bill which appears in printed page 56, original pages 170 and 171 in said Transcript of Record, after the words, "the premises being found for complainants they pray," strike out the following words, namely: "that for the aforesaid errors of law apparent on the face of the said decree of the 10th day of September, 1866, the same may be reviewed and reversed in the points herein complained of and further."

111 Tenth. Transpose the allegations of the said bill as so amended as aforesaid in such manner that the following allegations which are contained and set forth upon printed page 54, original pages 162 and 163, in said Transcript of Record, namely: "The complainants further say that on or about the 15th day of December, A. D. eighteen hundred and sixty-five the said Alfred Bent, one of the plaintiffs, deceased, at Taos, in said Territory, leaving three minor children and heirs, namely, the said Charles Bent, Julianio Bent and Alberto Silas Bent:

"That, afterwards, at the term of the said court held in and for the county of Taos, on the 9th day of April, 1866, such proceedings were had in the said cause, that the death of the said Alfred Bent was suggested upon the record, and thereupon his said minor children and heirs, Charles, Julianio and Alberto Silas, were made parties plaintiff, and their mother, Guadalupe Bent, widow of said Alfred Bent, was then and there appointed guardian *ad litem* for said minors, respectively," shall be stricken out from the place where the same are now set forth and contained and shall be inserted in the same precise words and figures immediately after the words "a copy of which is herewith filed and marked 'Exhibit A'" as the said words appear in printed page 53, original page 161, in said Transcript of Record.

T. B. CATRON,
LUCIEN BIRDSEYE,
Solicitors for Complainants.

112 And on the day and year last aforesaid there was filed in said clerk's office a bill of complaint as amended which is in the words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, {
County of Colfax. }

In the District Court of the First Judicial District, Sitting in the County of Colfax, Territory of New Mexico, for the Trial of Causes Arising under the Laws of the Territory, at the August Term, A. D. 1870.

To the Hon. Joseph G. Palen, chief justice of the supreme court of said Territory and judge of the first judicial district court thereof, in chancery sitting:

Your petitioners, Lucien B. Maxwell, of Cimarron, in the county of Colfax and Territory of New Mexico, aforesaid, and Luz B. Maxwell,

113 his wife, and The Maxwell Land Grant and Railway Company, a corporation, duly created, organized, and established under the laws of said Territory of New Mexico, and having an office and place of business at said Cimarron, bring this their bill of complaint, against Guadalupe Thompson, late Guadalupe Bent, administratrix of the estate of Alfred Bent, and her husband, George Thompson, Charles Bent, Julian and Alberto Silas Bent, the last three all being minors and all residents of the county of Las Animas, in the Territory of Colorado; and thereupon your orators complain and say that heretofore, to wit: on or about the eleventh day of January, A. D. eighteen hundred and forty-one, the Republic of Mexico, in due form of law, granted to Charles Beau-bien and Guadalupe Miranda, citizens of said Republic, a tract of land situate in the then province or department of New Mexico, constituting a part of the said Republic, which tract of land was described as follows, namely: Commencing on the east of Red river, a mound was erected, from whence following in a direct line in an easterly direction to the first hills another mound was erected at the point thereof, and continuing from south to north on the line nearly parallel with Red river a third mound was erected on the north side of the Cicorica or Chacuaca mesa, (table-land), thence turning toward the west and following along the side of the said table-land of the Chacuaco to the summit of the mountain, where the fourth mound was erected; from thence following along the summit of said main ridge, from the north to the south, to the Cuesta Del Osha, one hundred varas north of the road from Fernandez to the Laguna Negra, where the fifth mound was erected; from thence, turning again to the east towards Red river, and following along the southern side of the table-lands of the

114 Rayado and those of the Gonzalitos, on the eastern point of which the sixth mound was erected; from thence following in a northerly direction, to the west side of Red river, opposite the first, where the last and seventh mound was erected, all of which will more fully appear by reference to certified copies of said grant and act of possession herewith filed and made part of the bill and marked "C" and "D;" that the said grant was duly accepted by the said grantees who thereupon immediately entered into possession of the premises, and the said grantees and those holding under them have ever since maintained and still do maintain exclusive, quiet and peaceable possession thereof.

That afterwards, and on or about the twenty-first day of June, A. D. 1860, the said grant was duly ratified and confirmed by an act of Congress of the United States, in pursuance of the provisions in that behalf of the treaty between the United States and Mexico, known as the treaty of Guadalupe Hidalgo. That by sundry conveyances and purchases, and by inheritance, on the 29th day of May, A. D. 1865, the said Lucien B. Maxwell and wife had become and then were the sole owners in fee-simple and undivided of the whole of the aforesaid granted premises, with the exception of a few small parcels heretofore sold by them to other persons who had no interest in the object of this suit, nevertheless, subsequent to the

said last-mentioned dates certain deeds were executed to the said Maxwell in confirmation of purchases previously made by him, and if it should hereafter become necessary, the complainants beg leave of the court to set forth more specifically and in detail the origin of the title of the said Maxwell and wife.

115 That afterwards, to wit: on or about the 30th day of April, A. D. 1870, the said Lucien B. Maxwell and wife, being as aforesaid still seized and possessed of the said premises, for a valuable consideration sold and conveyed the premises to the said Maxwell Land Grant and Railway Company, by a warranty deed, with full covenants, reserving and excepting the home ranch, so called, consisting of about one thousand acres of land, and certain other small parcels of land and mineral rights; to which said deed, if it shall become necessary, the complainants beg leave to refer, as will appear by reference to a certified copy of said deed made a part of this bill, and marked "Exhibit E."

The complainants further say that heretofore, to wit, on or about the 12th day of September, 1859, Alfred Bent, then in full life but since deceased, Estefana Hicklin and Alexander Hicklin, her husband, Teresina Bent, alias Teresa T. Bent and Aloys Sheurick, her husband, and also by her next friend, Ceran St. Vrain, commenced a suit in the district court of the said Territory of New Mexico for the county of Taos, in the first judicial district, against the said Lucien B. Maxwell and Luz Beaubien Maxwell, his wife, and sundry other persons, who have now no interest in the object of this suit, and who are therefore not made parties thereto.

The complainants further say that diligent search has been made for the pleadings in the said suit of Alfred Bent and others, but the said pleadings cannot be found among the records of this court or elsewhere, and the complainants therefore aver that the said pleadings are lost or destroyed; but the complainants are informed

116 and believe and therefore aver that in the petition in the said suit of Alfred Bent and others it was in substance alleged that by a parole agreement made between one Charles Bent, the father of the said Alfred Bent, Estefana Hicklin, *née* Estefana Bent, Teresina Sheurick, *née* Teresina Bent, and the said original grantees, Charles Beaubien and Guadalupe Miranda, the said Charles Bent became and was equitably entitled to one undivided fourth part of the aforesaid granted premises, and that to the extent of such undivided one-fourth part the said Beaubien and Miranda and those holding under them were trustees of the legal title for the said Charles Bent in his lifetime; that no conveyance of the said undivided interest aforesaid had been made to the said Charles Bent in his lifetime; that the said Charles Bent died intestate, and that the said Alfred Bent, Estefana Hicklin, and Teresina Scheurick were the children and only heirs of the said Charles Bent, and that the defendants, to the extent that they severally and respectively held legal title to the premises, or part thereof, continued to hold such legal title in trust for said alleged children of Charles Bent, to the extent respectively of one undivided fourth part; and among other

things the said complainants prayed for a partition of the premises upon the footing of the claim as set forth in the said petition.

That the parties respectively appeared in said cause by their respective counsel, and the defendants filed their answer, which the complainants are informed and believe was in substance a denial of the equity set up in the plaintiffs' petition. The said cause came by legal continuances to the term of said court held within and for the county of Taos, on the 29th day of May, 1865, when and where

117 the respective parties again appeared, and such proceedings were had that an interlocutory decree was made and entered, in and by which it was in substance decreed and declared that in the lifetime of the said Charles Bent, the said Beaubien and Miranda held the legal title to one undivided fourth part of the said estate in trust for the said Charles Bent, who in equity was entitled to the said undivided one-fourth part thereof; that the said children of Charles Bent, upon the decease of their said father, had legal capacity to succeed to and did succeed to the said equitable interest of their father in the premises, as his only heirs-at-law. And it was adjudged and decreed that a partition should be made between the said children of Charles Bent and Lucien B. Maxwell, who had succeeded to the interest and estate of the said Miranda, as also certain daughters and a son of the said Beaubien mentioned in the said decree, and the said Alfred, Teresina, and Estefana, children of the said Charles Bent, and in and by the said decree commissioners were appointed, and directions given for making said partition, which said decree the complainants pray may be taken to be a part of this petition in the same manner as if the same were herein set forth at length, a copy of which is herewith filed and marked "Exhibit A."

The complainants further say that on or about the fifteenth day of December, A. D., eighteen hundred and sixty-five, the said Alfred Bent one of the plaintiffs, deceased at Taos, in said Territory, leaving three minor children and heirs, namely, the said Charles Bent, Julian Bent, and Alberto Silas Bent.

That afterwards, at the term of the said court held in and for the county of Taos, on the 9th day of April, 1866, such proceedings 118 were had in the said cause, that the death of the said Alfred Bent was suggested upon the record, and thereupon his said minor children and heirs, Charles, Julian, and Alberto Silas, were made parties plaintiff, and their mother, Guadalupe Bent, widow of said Alfred Bent, was then and there appointed guardian *ad litem* for said minors respectively. The complainants further say that afterwards and before any steps had been taken to carry the said decree into execution, an agreement by way of a compromise of what was still regarded as a doubtful and uncertain claim on the part of the said complainants was entered into, whereby, in consideration of the sum of eighteen thousand dollars to be paid by the said Maxwell, plaintiffs agreed with the said Maxwell to release and discharge the premises and every part thereof, and also the said Maxwell and wife from the said trust or equitable claim, and in confirmation of such release and discharge to convey to him, the said

Maxwell, all their right, title and interest, respectively, in and to the said premises, the sole object and purpose of the said agreement being to confirm the title of the said Maxwell and wife to the premises, and to release and discharge the same from the said trust or equitable claim set up by the plaintiffs.

Thereupon such other proceedings were had and held that it was made to appear to the said court that the aforesaid agreement between the plaintiffs and Lucien B. Maxwell for the extinguishment of the said claim or trust had been made, and that in consequence thereof the said interlocutory decree for a partition had not been carried into effect and executed; and thereupon at the request and with the consent of the solicitors for the respective parties, plaintiff

and defendant, it was further ordered by the said court
119 that the interlocutory decree aforesaid declaring the said trust and equity in favor of the plaintiffs and directing a partition, and all orders made under and by virtue of the said decree should be, and they were set aside; and it was then, upon like request and agreement, further ordered and decreed that the said Lucien B. Maxwell should pay to the plaintiffs in said suit the said sum of eighteen thousand dollars, to be divided among them as follows, namely: To the said Scheurick and Teresina Bent, his wife, one-third thereof; to the said Hicklin and Estefana Bent, his wife, one-third thereof; and to and among the said children of Alfred Bent, the remaining third part equally; the share of each to be paid into the hands of their said mother and guardian *ad litem*; and upon like request and agreement it was then and there further ordered and decreed by the court that the said Alexander Hicklin and Estefana Bent, his wife, and the said Aloys Scheurick and Teresina Bent, his wife, and the said Guadalupe Bent, guardian *ad litem*, as aforesaid, in the name of said Charles, Julian and Alberto Silas, should, within 10 days from the date, of said decree, severally execute and deliver to the said Lucien B. Maxwell good and sufficient conveyances of all their right, title, interest, etc., in the premises.

The complainants further say that on or about the 3rd day of May, 1866, the said Lucien B. Maxwell paid the said sum of eighteen thousand dollars to the persons and in the proportion as directed by said decree; that the sum of six thousand dollars was paid to the said Guadalupe Bent, administratrix of the said estate of the said

Alfred Bent, and guardian *ad litem* for said infants, and on
120 the 3rd day of May, 1866, the said Scheurick and wife executed and delivered to the said Maxwell a conveyance of one-third interest in the premises, and on the 31st day of May the said Hicklin and wife executed and delivered to the said Maxwell a conveyance of all their right, title, and interest in the premises; and on 3d day of May, eighteen hundred and sixty-six "the said Guadalupe Bent undertook to convey to the said Maxwell all the right, title, and interest in the premises of the said minor children of Alfred Bent, to this decree and deeds the plaintiffs also beg leave to refer from time to time, as it shall become necessary, in the same manner as if the same were herein set out at length, certified copies of which are herewith filed and marked "Exhibits B, F, G, and H,"

and prayed to be taken up as a part of this bill, the complainants further say that by the said agreement made between the said Lucien B. Maxwell and the plaintiffs, in the suit aforesaid, all of the equitable right, title, and interest, if any, of the said Charles Bent and of the said plaintiffs, derived from the said Charles Bent, became and was transferred to and vested in the said Lucien B. Maxwell, and extinguished, and the equitable right, title, and interest, if any, of the said plaintiffs, and each of them, and all trusts, if any, existing in their favor in the premises, was and is wholly extinguished and terminated and the premises and every part thereof, and all persons holding the same or any part or parcel thereof, became and were and are free and discharged of and from the said trust or equitable interest or claim, if any, of the said plaintiffs in the premises.

The complainants further say that the said agreement was fully carried out in good faith by the said surviving plaintiffs, Teresina Bent and Estefana Bent, and their husbands, respectively, by 121 the execution and delivery to the said Maxwell of the conveyance hereinbefore referred to, and so far as the same could lawfully be done under and be virtue of the said order, and the conveyance of Guadalupe Bent in behalf of the said minor children of Alfred Bent, deceased, under and in pursuance of the same, the said trust for equitable interest or claim, if any, of the said Alfred Bent and his said minor children and heirs was wholly terminated and extinguished; but the complainants say that they are advised that in the proceedings in the suit aforesaid, it is doubtful in law whether as against the said minor children and heirs of the said Alfred Bent, it sufficiently appears that they have no equitable or other interest in the said premises, and that such doubt creates a cloud upon the title to the premises which can only be removed by the interposition and decree of this court.

The complainants further say that, in fact, the share of the said Alfred Bent in the said eighteen thousand dollars, namely, six thousand, has passed into the hands of the personal representatives of the said Alfred Bent, namely, the said Guadalupe Thompson, late Guadalupe Bent, and widow of the said Alfred Bent, but now the wife of said George Thompson, who, on the 12th day of April, A. D. eighteen hundred and sixty-six, was duly appointed administratrix of the estate of said Alfred Bent by the Hon. Pedro Sanchez, judge of the court of probate within and for the county of Taos, in the Territory of New Mexico.

The complainants further state that the said agreement has been fully performed by the said Lucien B. Maxwell, and that the complainants are therefore entitled to hold the premises, free and discharged from the said trust, as well as against the heirs 122 of the said Alfred Bent, deceased, as against all other persons.

In tender consideration of the premises, and inasmuch as said complainants are without complete and adequate remedy by the strict rules of the common law, they refer all these matters and things to your honor's court in chancery, where there the same are

properly cognizable and relievable and ask that said defendants and each of them may be required, to the best of their information, knowledge and belief, full, true and perfect answers make to all and singular the allegations in this petition contained, and the premises being found for complainants, they pray that your honor will order, adjudge and decree, that the trust aforesaid be terminated and extinguished as against the defendants; that the defendants have no interest in or title to the premises, equitable or otherwise, and that the plaintiffs respectively shall hold the premises according to the respective interests therein, free and discharged of all trusts in favor of the defendants, and any and all persons claiming under them, and grant to the complainants such other and further relief as may be just and equitable.

May it please your honor to grant unto complainants the writ of subpoena to be directed to Guadalupe Thompson, administratrix of Alfred Bent, deceased, and George Thompson. Julianio Bent, Charles Bent and Alberto Silas Bent, commanding them and each of them, on a certain day, and under a certain penalty therein inserted, to appear at the next regular term of the court of the county of Colfax, then and there to answer the premises and abide the order and decree of the court.

T. B. CATRON,
LUCIEN BIRDSEYE.

Solicitors for Complainants.

123 And afterwards to wit, on the 9th day of April, A. D. 1880 there was filed in said clerk's office the joint and several answers of the defendants to last amended bill which said answer is in the words and figures as follows, to wit:

124 *Joint and Several Answer of Defendants to Last Amended Bill.*

TERRITORY OF NEW MEXICO, }
County of Colfax, } ss:

In the District Court of the First Judicial District, Sitting in and for the County and Territory Aforesaid.

THE MAXWELL LAND GRANT AND RAILWAY COMPANY *et al.* }
vs. }
GUADALUPE THOMPSON *et al.* }

The joint and several answer of Guadalupe Thompson, George W. Thompson (called in plaintiffs' bill as amended George Thompson), husband of the said Guadalupe; Charles Bent, Julianio Bent, and Alberto Silas Bent, the last three being infants and answering hereto by George Boyles, their guardian *ad litem*, to the bill of complaint as amended of Lucien B. Maxwell and Luz B. Maxwell, his wife, and the Maxwell Land Grant and Railway Company, filed herein at the March term, A. D. 1880.

These respondents having heretofore filed their answer to the original bill filed against them in the above-entitled cause, and the

amendments, thereto, and the complainants having since the filing of their said complaint and amendments, to wit: on or about the 24th day of March, A. D. 1880, in pursuance of the mandate of the said Supreme Court of the United States and the order of this court, still further amended their bill of complaint in many important particulars and leave to these respondents to answer the said bill of complaint as last amended having also been obtained from this honorable court.

125 These respondents now and at all times hereafter reserving all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill as amended contained for answer thereto or unto so much or such parts thereof as these respondents are advised are material for them to make answer unto, answering say, they admit that the Republic of Mexico granted unto Charles Beaubien and Guadalupe Miranda a tract of land as stated in complainants' bill, and that the same was duly ratified, by Congress etc., but respondents deny that they, the said Beaubien and Miranda, and those holding under them have ever since maintained and still maintain exclusive, quiet and peaceable possession thereof.

Respondents deny that on the 29th day of May 1865 or at any other time, the said Lucien B. Maxwell and wife had become, and then, or at any other time were the sole owners, in fee-simple and undivided of the whole of the aforesaid granted premises with the exception of a few small parcels heretofore sold by them to other persons.

And respondents know nothing in regard to certain deeds alleged by plaintiffs to have been executed subsequently to the said last-mentioned dates, to the said Maxwell, in confirmation of purchases previously made by him.

Respondents further say that they are strangers to, and know nothing of their own knowledge of the sale and conveyance, by Lucien B. Maxwell and his wife of the premises or grant aforesaid, to the said Maxwell Land Grant and Railway Company, and therefore leave complainants to make such proofs thereof as they shall be able to produce.

126 Respondents admit that at or about the time alleged in complainants' bill, Alfred Bent, since deceased, Estefana Hicklin and Alexander Hicklin, her husband, Teresina Bent (now Scherick) and Aloys Scherick her husband, and also by her next friend Ceran St. Vrain, commenced a suit in the district court of the said Territory of New Mexico for the county of Taos, in the first judicial district, against the said Lucien B. Maxwell and Luz Beaubien Maxwell, his wife, and sundry other persons as to whose interest in the object of this suit respondents are not advised.

As to the loss of pleadings in said suit and complainants' search for the same, these respondents know nothing, nor do they know anything as to what is alleged, in said pleadings, and pray that all the means in the power of this honorable court be used to find said

pleadings and have them before this honorable court, or that complainants be held to make strict proof of the same.

They admit, however, that Charles Bent died intestate, and that the said Alfred Bent, deceased, Estefana Hicklin and Teresina Scheurick were the children and only heirs of the said Charles Bent, and that they were entitled equitably, or otherwise, to the one-fourth part of the aforesaid grant or tract of land; but as to the exact legal or equitable title, or how it was claimed or asserted in the pleadings in said cause respondents are not advised otherwise than by complainants' bill and the decree of partition rendered in said cause.

They admit, however, that the complainants in said cause prayed for a partition of the premises referred to in said cause, upon the footing of the claim as set forth in their petition in said cause.

Respondents admit that the parties respectively appeared
127 in said cause by their attorneys, and that the defendants therein filed their answers, but as to the substance and import of said answers, respondents are not advised otherwise than by what still remains of the record in said cause.

Respondents admit that said cause came by legal continuance to the term held in and for the county of Taos, on the 29th day of May, 1865, when and where the respective parties again appeared as the record shows, and that a decree was rendered which, for greater certainty, is here referred to, and a copy herewith filed, marked "Exhibit A" and prayed to be taken as a part of the answer of these respondents. Respondents admit that in the month of December, A. D. 1865, to wit: on the 9th day of said month, at Taos, in this Territory, the said Alfred Bent departed this life, and that he left three minor children and heirs, who respondents allege are still minors and the only heirs of the said Alfred Bent, deceased, to wit: the respondents, Charles Bent, Julianio Bent and Alberto Silas Bent.

Respondents, further answering, say that as to what agreement the other parties to the said suit for partition may have made with the said Maxwell, they are not fully advised, but wholly deny that the said Alfred Bent in his lifetime, or these respondents, or either or any of them, after the death of the said Alfred Bent, or at any other time, ever entered into or became a party or parties to any agreement by way of a compromise, sale, or otherwise, by which the rights, title or interest of the said Alfred Bent, or these respondents or either or any of them, in and to the said grant and premises, was compromised, released, sold or surrendered as alleged in complainants' bill of complaint.

And respondents further answering say that it is not true
128 as alleged in said complaint, that the claim of the said Alfred Bent, and after his death the claim of the infant respondents herein, in and to their undivided interest in said grant and premises, was ever regarded by them, or either of them, as a doubtful or uncertain claim, but upon the contrary aver that at the time of the alleged agreement and compromise the same was a valid and subsisting claim, and right confirmed and established by the decree of

the court in the said proceedings for partition of said grant and premises.

And respondents say that as to the proceeding alleged by complainants to have taken place at the term of court held in and for the county of Taos, on the 9th day of April, 1886, and at a subsequent term, or terms of said court, they beg leave to refer to the record of said court for a full, perfect and more certain answer herein, but these respondents are advised and therefore allege that all of the said proceedings were illegal, unjust and void, as to these minor respondents, Charles Bent, Julianio Bent and Alberto Silas Bent, and the said respondents further deny that it was ever made to appear to said court, that an agreement between these respondents or any of them, or the said Alfred Bent, had ever been made with the said Maxwell, for the extinguishment of the claim of these respondents or either or any of them, or of the claim of the said Alfred Bent in his lifetime.

And respondents further deny that the said decree, setting aside the former decree establishing the right and interest of said Alfred Bent was ever made at the request and with the consent of the solicitors of these respondents, or any of them, or of the said Alfred Bent, nor did these infant respondents, or any one having
129 authority to represent them, ever authorize any solicitor or solicitors to consent to any decree for the transfer or surrender of their rights as alleged in the complaint herein.

And respondents, further answering, say that the said pretended agreement and proceedings were fraudulent as to these infant respondents, and involved an unjust, ruinous and illegal sacrifice of their just and valid rights; that their interest in the said grant or premises alleged to have been sold, released or surrendered as aforesaid for the sum of six thousand dollars, was at that time worth not less than one hundred thousand dollars, and is now worth a much greater sum.

That said alleged settlement and compromise was not in any way beneficial or advantageous to these infant respondents, or necessary for their support or maintenance.

Respondents admit that the several payments in pursuance of the said pretended decree were afterwards made as by complainants alleged to the said Estefana Hicklin and Teresina Scheurick, and their husbands, and that the said agreement was fully carried out in good faith by the said surviving plaintiffs, Teresina Bent, now Scheurick, and Estefana Bent, now Hicklin, and their husbands, so far as they were bound and effected by the same, by their respectively executing and delivering to the said Maxwell the conveyances referred to in complainants' bill.

Respondents deny that the said sum of six thousand dollars has ever been paid to the respondent, Guadalupe Thompson, as administratrix of the estate of Alfred Bent, deceased, or that the
130 same has ever been paid to her at all; but admit that a partition of the said sum of six thousand dollars, not to exceed the sum of one thousand dollars may have been paid to her as guardian *ad litem*. Said payment of the sum of one thousand dol-

lars or thereabouts, if made at all, being made to her in personal property and not in cash, respondents averring that neither the estate of said Alfred Bent, deceased, nor these infant respondents have ever received any portion whatever of the said sum of one thousand dollars.

But these respondents say that should it be made to appear upon the hearing of the cause that the said Guadalupe Thompson, as administratrix of the estate of Alfred Bent, deceased, or any one legally representing her or these minor respondents, ever received the said sum of six thousand dollars or any part thereof, for the purposes and in pursuance of the alleged agreement as set forth in the complaint, that they are now ready and willing and here offer to repay the same to the said Maxwell or his legal representatives upon such just and equitable terms as the court may prescribe.

Respondents further answering, deny that the respondent, Guadalupe Thompson, on the third day of May, 1866, or at any other time, undertook to convey to the said Maxwell all the right, title and interest of these minor respondents in said premises, and aver that, in making said pretended deed she was wholly ignorant of her duties, obligations and responsibilities as guardian *ad litem* or as commissioner in chancery to carry into effect sales, etc., under and by virtue of the said pretended decree and wholly ignorant of the rights of the said minor children and respondents herein.

131 And respondents further aver that the said alleged deed was procured from the said Guadalupe Thompson through deceitful practices and fraudulent representations upon the part of the said Maxwell and others confederating with him to that end.

And respondents say that as to whether the said trust or equitable interest or claim of the said Alfred Bent and his minor heirs, the infant respondents herein, was wholly terminated and extinguished, or not, respondents are not competent to answer, there being — question of law referable to the court for decision; but they are advised and therefore allege that the said supposed deed of conveyance by the said Guadalupe Thompson was and is illegal and void and wholly inoperative as far as the rights and interests of these minor respondents are concerned.

And respondents further answering say that as to the allegations of complainants touching the supposed order or decree and the effect of the proceedings in this court last above referred to these respondents are not competent to answer as they are advised. They are questions of law, wherefore they are referred to this honorable court for its decision.

They deny, however, that by said proceedings the minor heirs of Alfred Bent, deceased, to wit: the infant respondents herein, were in any manner divested of any title, either legal or equitable, they had at the time in said grant or tract of land.

And the said respondents aver that the pretended order and decree setting aside the prior decree, establishing and confirming the right and interest of the said Alfred Bent in and to the said grant and premises were obtained by fraud and deceitful practices upon the part of the said Maxwell.

132 Respondents further answering deny that the sum of six thousand dollars has ever passed into the hands of the personal representatives of said Alfred Bent, deceased, and deny that the said alleged agreement has ever been fully performed by the said Maxwell, and deny that complainants are entitled to hold said premises free and discharged of any trust, right or title existing in behalf of the said Alfred Bent or his said minor children and heirs.

And the said respondents, Charles Bent, Julianio Bent and Alberto Silas Bent, further answering by their said guardian *ad litem*, say they are infants under the age of twenty-one years, and that they therefore in addition to the matters and things hereinbefore set forth and alleged, submit their rights and interest in the matter in question in this cause to the tender consideration and protection of this court and pray strict proof of all material matters and things in said bill contained not hereinbefore specifically admitted.

And these respondents deny all manner of unlawful combination, etc., without this that there is any other matter or thing in the complainants' said bill contained material or necessary for these respondents to make answer unto and not herein, and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of these respondents.

All which matters these respondents are ready and willing to aver, maintain and prove as this honorable court shall direct and humbly pray to be hence dismissed with their reasonable costs, etc.

GUADALUPE THOMPSON AND
GEORGE W. THOMPSON,

133 By their solicitors, H. MERIAM AND
YEAMAN & JOHN.
CHARLES BENT,
JULIANO BENT, AND
ALBERTO SILAS BENT,

By GEORGE BOYLES,

Their Guardian ad Litem.

134

Amendments to Bill.

TERRITORY OF NEW MEXICO, }
 County of Colfax. }

In the District Court for the First Judicial District, Sitting in and for the County of Colfax for the Trial of Causes Arising under the Laws of the Territory.

THE MAXWELL LAND GRANT AND RAILWAY COMPANY and LUZ B. MAXWELL

vs.

GUADALUPE THOMPSON, Late GUADALUPE BENT, Administratrix of the Estate of Alfred Bent, Deceased, and George Thompson, Her Husband, and Charles Bent, Julianio Bent, and Alberto Silas Bent, Infants, by George Boyles, Guardian *ad Litem*. } In Chancery.

To the Honorable L. Bradford Prince, chief justice of the supreme court of the Territory of New Mexico and judge of the first judicial district court thereof, in chancery sitting:

And now the said complainants, by special leave of the court first had and obtained, amend their bill of complaint in this action, as hereinbefore amended and which was filed on the 24th day of March, A. D. 1880, in the manner following, to wit:

First. Strike from said amended bill the name of Lucien B. Maxwell as a complainant therein.

Second. Add to said bill at the end of the stating part thereof, the following allegation:

135 That since the commencement of this suit, said Lucien B. Maxwell, one of the original complainants therein, departed this life; that prior to his death the said Lucien B. Maxwell and Luz B. Maxwell, his wife, by their deed of conveyance, dated the seventh day of September, A. D. 1870, sold, transferred and conveyed, with full covenant of warranty, to the said The Maxwell Land Grant and Railway Company, the home ranch and all the remaining rights, title and interest which they or either of them had in and to the property and every part and portion of the property in question in this suit, so far that they only remain interested in the suit to the extent of their warranty to the said The Maxwell Land Grant and Railway Company and to the extent of the costs in this suit.

T. B. CATRON,
 FRANK SPRINGER,
Solicitors for Complainants.

136 And afterwards, to wit: on the day and year last aforesaid, the same being April 6th, 1882, there was filed in said clerk's office the further answer of Charles Bent, which is in the words and figures as follows, to wit:

Further Answer of Charles Bent.

TERRITORY OF NEW MEXICO, {
 County of Colfax. }

In the District Court in and for the said County of Colfax, of the
 March Term Thereof, A. D. 1882. In Equity.

THE MAXWELL LAND GRANT AND RAILWAY COMPANY *et al.* }
vs. }
 GUADALUPE THOMPSON *et al.*

The further answer of Charles Bent, of lawful age, one of the de-
 fendants, to the amended bill of complaint of The Maxwell Land
 Grant and Railway Company *et als.*, heretofore filed on the 24th
 day of March, A. D. 1880.

The said Charles Bent, against whom in his infancy, the said bill
 was exhibited by leave of the court, and in lieu of the answer to
 the said bill of complaint heretofore filed herein in his behalf, by
 George Boyles, then guardian *ad litem* to this defendant, answering
 to the said amended bill, saith :

He admits the grant of said lands by the Republic of Mexico, to
 said Miranda, and Beaubien ; admits that the grant was duly ac-
 cepted by the said grantees ; denies that said grantees then or at
 any time entered into possession of said premises ; admits that they
 entered into some small parts thereof ; denies that they or
 137 those holding under them have at any time maintained or
 do now maintain exclusive, quiet, or peaceable possession of
 the whole of said tract ; avers on information and belief, that much
 the larger part of said grant has been always and until one year
 last past or thereabouts, vacant and unoccupied, and a large part of
 said grant of lands, is now in the hostile and exclusive possession
 of others, not holding under said Beaubien and Miranda or either
 of them.

Admits that said grant was duly confirmed by act of Congress of
 the United States, as stated in the bill ; denies that by any means
 whatsoever the said Lucien B. Maxwell and wife or either of them
 ever became or at any time were the owners in fee-simple, undivided
 of the whole of said grant with or without the exceptions in the said
 bill mentioned.

Whether any such deeds as in said amended bill mentioned, were
 at any time executed to the said Maxwell in confirmation of any
 such purchases by him as in said complaint mentioned, this defend-
 ant hath no knowledge, information or belief, save by and from the
 said bill of complaint.

This defendant believes it to be true that at or about the time in
 the said bill mentioned or before that the said Lucien B. Maxwell
 and wife, sold and conveyed the said premises to the said Maxwell
 Land Grant and Railway Company as in the said bill averred and

set forth; but this defendant denies that at the time of the said sale and conveyance or either thereof, the said Maxwell and wife or either of them were seized or possessed of the whole of said premises, though

138 this defendant believes it to be true that the said Maxwell and wife were at that time seized of and entitled unto a certain undivided interest, to wit: eleven-twelfths of the said grant, save in certain parts thereof theretofore conveyed by said Maxwell and wife or one of them, and that said Maxwell at the date of said conveyance to the said Maxwell Land Grant and Railway Company, was possessed of the said home ranch in the bill mentioned, and certain mining claims, and other small parcels of land situate within the limits of the said grant. This defendant admits it to be true that about the time in the said bill mentioned the said Alfred Bent, Estefana Hicklin, Alexander Hicklin, her husband, Teresina alias Teresa T. Bent and Aloys Scheurick, her husband, (the said Teresa also suing by her next friend, Ceran St. Vrain,) commenced a suit in the district court of the said Territory of New Mexico, for the county of Taos, against the said Lucien B. Maxwell and Luz, his wife, and sundry other persons, to wit:—Guadalupe Miranda and Charles Beaubien, before named, and one Joseph Pley; but whether the said persons have or have not an interest in the objects of this suit, this defendant is not advised, and therefore neither admits or denies the allegations of said bill in that behalf.

This defendant further answering saith, that whether diligent search was at any time made for the pleadings in the aforesaid suit of Alfred Bent and others, this defendant is not informed save in and by the said bill; but this defendant denies that the said pleadings are lost or destroyed, or cannot be found. On the contrary, this defendant avers on information and belief, that after the exhibition of the said original bill the said pleadings were found, and

139 that certified copies thereof, or what purported so to be, were exhibited in proof, at the former hearing of this cause.

This defendant on information and belief, admits that the petition in the action aforesaid of the said Alfred Bent and others, was in substance as in the said bill set forth.

Admits on information and belief, that such proceedings in the said suit were had, as in the said bill alleged, and that on or about the 29th day of May, A. D. 1865, a decree was made and entered in the said cause in the district court of Taos county aforesaid, substantially as in the said amended bill set forth.

Avers that by the terms of the said decree the undivided one-fourth part of said grant was established and confirmed to them the said Alfred, Estafana and Teresa, their heirs and assigns forever with the full and perfect right, power and authority to possess and enjoy the same.

And this defendant believes that the certain paper-writing filed with the original bill herein, and marked Exhibit "A" is a true copy of the said decree.

This defendant craves that the said Exhibit "A" may be read and taken as a part of this, his answer, with like effect as if the same were herein set forth at large.

That for greater certainty this defendant craves leave to refer at the hearing to the original or some duly authenticated copy of the said decree.

This defendant admits that the said Alfred Bent, afterwards departed this life at Taos in said Territory, but avers on information and belief, that his death occurred on or about the 9th day of December, 1865. Admits that the said Alfred Bent, left him surviving three children, his sole heirs-at-law, to wit, this respondent, then an infant, but who since the filing of the former answer in his behalf herein, to wit: on the 26th day of April, A. D. 1881, hath come of full age, and the said Juliano Bent, and Alberto Silas Bent, then and still infants of tender years.

Admits that this respondent and the said Juliano and Alberto Silas were afterwards made parties complainant in that said suit, and that Guadalupe Bent, widow of the said Alfred Bent now Guadalupe Thompson, wife of George W. Thompson Esq., was appointed guardian *ad litem* for the said infants.

This defendant further answering saith that he hath been informed, and believes it to be true that the said other plaintiffs in that said suit, to wit: the said Estafana Hicklin and the said Teresa Sheurick and their said husbands respectively did after the said entry of the said decree of partition, enter into some agreement, to release and convey unto the said Lucien B. Maxwell the interests of the said Estafana and Teresina in the said grant of lands and did convey to him the said Maxwell their right, title, and interest in and to the said premises, and this defendant hath heard and believes it to be true that the ostensible consideration thereof was the sum of six thousand dollars, to be paid by the said Maxwell to the said Estafana Hicklin, and a like sum to be paid to the said Teresina Sheurick, or to their husbands respectively, but what sum, if any, was in truth paid or agreed to be paid by the said Maxwell to the said Estafana or to the said Teresina or to the husband of either of them, in respect of the said agreement or the said conveyances or releases, or whether the object or purpose of the said agreement was as stated in the said bill of complaint, this defendant hath no knowledge, information or belief, save by and from the said bill of complaint, and neither admits nor denies the allegations of the said bill of complaint in that behalf. Whether at the time of the said agreement the claim of the said plaintiffs in that aforesaid suit was regarded as a doubtful or uncertain claim, on the part of the said plaintiffs, or whether the agreements, so made and entered into between the said Estafana and Teresina and their said husbands with the said Maxwell were made or entered into by way of compromise, this defendant is not informed, save in and by the said bill of complaint.

But this defendant avers on information and belief, that the said agreements, and the conveyances of the said Estefana and Teresina, and their said husbands of their interests in the said grant, were procured and entered into by means and by reason of certain fraudulent representations made or procured to be made by said Maxwell

unto said Estefana and Teresina or their said husbands, touching the extent, character and value of the said grant.

This defendant denies that any such agreement as in the said bill of complaint in that behalf alleged was made or entered into by or in behalf of this defendant the said Juliano, the said Alberto Silas, or either of them.

Denies that they or either of them or the said Guadalupe Bent, or any person having authority for them or either of them in that behalf, ever made or entered into such agreement, though this defendant on information and belief admits that on or about the day in the bill of complaint in that behalf mentioned, the said Estefana and Teresina and their said husbands respectively did make, execute and deliver conveyances of their right, 142 title, and interest in the said premises. That on or about the 3rd day of May 1866, the said Guadalupe Bent, did undertake and assume to convey to the said Maxwell all the right, title, and interest of the said minor children of the said Alfred Bent in and to the said grant and premises but this defendant on information and belief avers that the said Guadalupe Bent, now Guadalupe Thompson is a Mexican woman, and at the time of her said appointment as guardian *ad litem* of the said infants, and at the time of the said pretended conveyance of the interests of said infants in said premises unto said Maxwell, and at the time of the entry of the said decree in the amended bill set forth, setting aside the decree declaring the trust in equity in favor of the said Alfred, Estefana and Teresina, and directing partition of the said lands, the said Guadalupe Bent now Guadalupe Thompson, was wholly ignorant of the English language, unable to write, read or speak the same, unfamiliar with business, or proceedings of courts of law, unacquainted with the rights of said infants in the premises, or her duties in that behalf, as their guardian *ad litem*, and was ignorant of the bounds or extent, character or value of the said grant, and was ignorant of the fact that the said grant had been confirmed by act of the Congress of the United States, and was ignorant of the entry of the decree of the said district court of the county of Taos, establishing the right of the said Alfred, Estefana and Teresina in the said grant, and directing partition thereof, and was ignorant of what part or share in said grant was in fact claimed by the said Alfred Bent in his lifetime; that in and about the management of her business, property and affairs, the said Guadalupe Bent was at all the times aforesaid, wont 143 to consult with and rely upon the advice of the said Aloys Scheurick, that said Scheurick was then residing near to the said Guadalupe Bent, and was always after the death of the said Alfred Bent, accustomed to profess great friendship and regard for her and her children; and a desire to protect and assist her in the management of the estate and property which had been left by the said Alfred Bent, and to protect the interests of her said infant children, that by reason of these professions of the said Aloys and the connection in marriage which had subsisted between the said Aloys and the said Alfred Bent in his lifetime the said Guadalupe

Bent at all the times aforesaid, reposed especial trust and confidence in the said Aloys Scheurick; that the said Lucien B. Maxwell was at all the times aforesaid and long before that as the said Guadalupe and the said Aloys well knew, a man of great wealth and influence, and well knowing the weakness, ignorance and inexperience of the said Guadalupe Bent, and her want of information, as to the extent, value and character of the said grant, and of the confirmation thereof and of the decree establishing the right of the said Alfred, Estefana and Teresina in the said grant, the said Lucien B. Maxwell caused and procured the appointment of the said Guadalupe Bent as guardian *ad litem* to the said infants, and caused and procured the pretended conveyance of the right of said infants in the said premises to be prepared for execution by the said Guadalupe Bent, and caused and procured the said Aloys Scheurick to believe and represent, and the said Scheurick by procurement of said

144 Lucien B. Maxwell or otherwise did represent to the said Guadalupe Bent that the said grant of lands, was for the most part fit only for grazing; that the same contained little or no mineral of value; that the same extended only to the northern line of the Territory of New Mexico; that he the said Maxwell was the owner of the major part of said grant and might and would control the whole thereof, and exclude the said infants from all share or part thereof; that she, the said Guadalupe Bent, was duly authorized to sell and convey the interest of said infants, and that unless she should accept the sum of six thousand dollars therefore; and convey the same to said Maxwell, neither she nor the said infants, would ever realize anything for the interest of said infants in the said grant.

This defendant further answering saith on information and belief, that confiding in the representations of the said Scheurick, not knowing the contrary thereof, and moved and induced by the said representations, and her knowledge of the wealth power and influence of the said Maxwell, the said Guadalupe Bent did assume to execute the pretended conveyance of the interest of said infants in the said premises unto said Maxwell as in the said bill of complaint mentioned.

This defendant, further answering, saith on information and belief, that neither at the time of the execution of her said pretended conveyance, nor at any time before that, was the said pretended conveyance read or interpreted to the said Guadalupe Bent; that said pretended conveyance was executed without the advice of counsel, and at the time thereof the said Guadalupe Bent was in entire ignorance of the character, extent or value of said grant, and of the right and share which said infants had therein.

This defendant, further answering, saith, on information
145 and belief, that neither then nor at any time afterwards did the said Lucien B. Maxwell pay to the said Guadalupe Bent in her capacity as guardian *ad litem* for the said infants or otherwise, the said sum of six thousand dollars or any sum of money whatever for or on account of the right and interest of the infant heirs of Alfred Bent in the said grant, nor was any such payment

of any sum of money whatever made by said Maxwell to this defendant, or to either of said infants, or to *and* any person authorized to receive the same, on behalf of them or either of them.

This defendant further answering saith on information and belief, that the before-mentioned grant contains two million acres of land or thereabouts, and abounds in valuable mines of gold and silver and other valuable minerals and metals; that the said grant also contains a large extent of — acres or thereabouts of well-watered, irrigable lands, suitable for cultivation, and extensive forests of pine and other trees, and that all the residue of the said grant of lands, is valuable for grazing; that the interest and share of the said infants therein, at the time of the execution of the conveyance thereof to said Maxwell, *was* reasonably worth the sum of one hundred thousand dollars or more, and have ever since been appreciating in value; that the said grant in fact extends beyond the northern boundary of the Territory of New Mexico; that two hundred thousand acres or thereabouts of valuable lands within the limits of the former Territory and now State of Colorado, are and

always were parcel of said grant.

146 All which on information and belief this defendant shows, was at the time of procuring the said pretended conveyance, well known to the said Lucien B. Maxwell, and was unknown to the said Guadalupe Bent.

This defendant further answering saith on information and belief, that this defendant's ancestor, the said Alfred Bent left a considerable estate in houses and lands, other than the said grant, and in moneys and personal property, and the said Guadalupe Bent, out of the said estate, was then and always afterwards well able to support and educate the said infants, and neither at the times aforesaid nor at any time, was there any necessity for the sale or other dispositions of the interests of said infants in the said grant.

This defendant further answering, admits on information and belief, that — the September term 1866 of the district court of the said county of Taos, and after the procurement by the said Lucien B. Maxwell of the aforementioned pretended conveyance by the said Guadalupe Bent unto him of the interests of said infants it was ordered by the said district court that the aforementioned decree declaring the rights and interests of the said Alfred, Estafana, and Teresina in the said grant and directing partition thereof and all orders made under and by virtue of the said decree should be and were set aside, and that the said Lucien B. Maxwell should pay to the plaintiffs in that said suit the sum of eighteen thousand dollars, to be divided in manner as in the said amended bill mentioned, and that the said Alexander, Estefana, Aloys and Teresina, and the said Guadalupe Bent, guardian *ad litem* as aforesaid, in the name

within ten days from the date of said decree, severally
147 execute to and deliver to the said Lucien B. Maxwell, good and sufficient conveyances of all their right, title and interest in and to the said premises.

And this defendant, further answering, admits, on information

and belief, that at the time of the entry of said order or decree, it was made to appear to the said district court, that such agreement as in the said bill of complaint herein is falsely alleged, had been made.

This defendant further admits that, on information and belief, that the said last-mentioned order and decree was made at the request and with the consent of the solicitor of the said Maxwell.

Denies that, to the information or belief of this defendant, the said Guadalupe Bent or any solicitor representing her, or either of the said infants, heirs of the said Alfred Bent, ever requested or consented to the last-mentioned order or decree, or that the said Guadalupe Bent nor any person on behalf of this defendant, ever consented or agreed as in the said last-mentioned order and decree is falsely recited, or assented or agreed to the setting aside of the former decree establishing the right of the said Alfred Bent, and the said Estefana Hicklin and Teresina Sheurick in the said grant, and directing partition thereof.

And this defendant further answering saith on information and belief, that the entry of the said order and decree, at the September term 1866, of the district court of said Taos county, was procured in the absence of the said Guadalupe Bent, and without notice to her, of any intention to apply therefor; and by the false representations of the said Lucien B. Maxwell, or the said Aloys Sheurick, or some other person or persons to this defendant unknown made to the said district court, that the said Guadalupe Bent, as
148 guardian *ad litem* to the said infants was consenting to the entry of the said decree as the same was entered at the September term, A. D. 1866, of the said district court, that all and singular the facts hereinbefore set forth, touching the ignorance, weakness and inexperience of the said Guadalupe Bent, and the imposition practiced upon her, and the extent and value of the said grant, and the estate, real and personal, left by the said Alfred Bent, and the ability of the said Guadalupe Bent out of the said estate to maintain and educate the said infants *infants*, were concealed from the said district court at the time of the entry of the said decree, at the September term, 1866, of the said district court; and solely by reason of the said concealment, and the said false representation, the said district court without any reference of the matter to the master, and without any inquiry or judicial examination as to whether the said decree was or would be beneficial to the said infants, the said district court at its said September term, 1866, gave and entered the decree in the said bill of complaint in that behalf set forth.

This defendant, further answering, denies, on information and belief, that the said Lucien B. Maxwell on the 3rd day of May, 1866, or at any time paid the said sum of eighteen thousand dollars to the persons, or in the proportions as directed by said decree.

Avers, on the contrary, that the said decree in the said amended bill last mentioned and set forth, was made and entered more than four months after the said third day of May, 1866.

Denies, on information and belief, that the sum of six
149 thousand dollars or any sum whatever was ever paid to said
Guadalupe Bent in any capacity whatever.

Whether the said paper-writings marked B. F. G. and H. in the
said amended bill mentioned and referred to are true copies of the
said decree and conveyances in that behalf, this defendant cannot
state, inasmuch as the defendant hath never had opportunity to
examine the originals of either thereof, or to compare the same with
the said exhibits.

This defendant denies that by any such agreements as in the said
amended bill alleged, the equitable right, title and interest which
was of the said Charles Bent, in his lifetime, or of the plaintiffs in
that aforementioned suit became or was transferred to or vested in
the said Lucien B. Maxwell or extinguished.

Denies that the interests of the said plaintiffs in that said suit or the
trusts existing in their favor in the said premises, extinguished and
terminated.

Denies that the said premises or those holding the same, became
or were, or now are discharged of said trust or the interests or
claims of the plaintiffs in that said suit, in the said premises;
though this defendant is advised, and for anything this defendant
knows, it may be true that by the conveyances aforesaid of the said
Estafana, Teresina, and their said husbands, all their interests in
the said premises passed to and became invested in the said Lucien
B. Maxwell.

Admits the execution and delivery by the said Estafana and
Teresa, otherwise called Teresina, and their said husbands, unto
said Maxwell of the conveyances in the said bill of complaint
mentioned.

Denies that the pretended conveyance of the said Guada-
150 lupe Bent assumed and pretended to be made in behalf of
the said minor children of said Alfred Bent deceased was
made or pretended to be made in pursuance of the said last-men-
tioned order or decree of the said district court.

Denies that by any of the said conveyances, the right and title of
the infant heirs of the said Alfred Bent in the said premises, was
terminated or extinguished. Denies on information and belief,
that any part of the said eighteen thousand dollars in the complaint
mentioned, has ever passed into the hands of the personal repre-
sentatives of the said Alfred Bent, or into the hands of the said
Guadalupe Thompson, widow of the said Alfred Bent.

Denies on information and belief that the said Guadalupe Bent
now Thompson, was ever appointed administratrix of the estate of
said Alfred Bent.

Avers on information and belief, that if such appointment was
made, the said Guadalupe Bent never accepted the same, or quali-
fied in her said office.

Denies that any such agreement as in the complaint mentioned,
has ever been performed by the said Lucien B. Maxwell.

Denies that the complainant- or any of them, are by any means

whatever, entitled to hold the said premises as against the heirs of the said Alfred Bent, deceased.

This defendant is advised that by the said decree, first in the said bill set forth, the said Alfred Bent in his lifetime, became and was fully seized of, and entitled unto the equal undivided one-twelfth part of the said grant, and was and is entitled, and his heirs-at-law aforesaid, are now entitled to have the same set off and partitioned to them in severalty.

This defendant is advised that by the said amended bill, it
151 appears that the said plaintiffs have not any title to the relief thereby demanded; neither hath this court any jurisdiction to entertain the said bill, or to grant the relief thereby demanded, and this defendant craves the same benefit of this defense, as if he had demurred to the said bill.

This defendant denies all unlawful combination, wherewith he is by the said bill charged, without this, that any other matter or thing in the said amended bill contained, and not herein and hereby well and sufficiently traversed or confessed and avoided, is true to the knowledge or belief of this defendant, and humbly prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

CHARLES BENT.

E. L. SMITH,

CALDWELL YEAMAN,

Of Counsel for Defendant Charles Bent.

STATE OF COLORADO, }
County of Las Animas, } ss:

Charles Bent being first duly sworn saith on oath that he is one of the defendants in the cause mentioned in the foregoing answer by him subscribed, that he hath read the said answer and knows the contents thereof and the same is true to the knowledge of deponent except as to those matters which are stated on information and belief, and as to those matters he believes them to be true.

(Signed)

CHARLES BENT.

Subscribed and sworn to before me this third day of April, A. D. 1882.

[SEAL.]

NORVAL W. WALL,

Notary Public.

152 And afterwards, to wit: at a regular term of the district court of the first judicial district of the Territory of New Mexico begun and held within and for the county of Colfax at the court-house of said county, in the town of Springer, on the first Monday after the fourth Monday of March, 1883, for the trial of causes arising under the laws of said Territory.

Present: The Honorable Samuel B. Axtell, chief justice of the supreme court of the Territory of New Mexico, and judge of the first judicial district court thereof.

William Breeden, attorney general of said Territory.

Mason T. Bowman, sheriff of the county of Colfax.

C. M. Phillips, clerk of said court.

And on the eighth day of said term, the same being Tuesday, April 10th, A. D. 1883, exceptions to amended answer were sustained in the words and figures as follows, to wit:

Judgment on Exceptions to Answers.

TERRITORY OF NEW MEXICO, }
Colfax County. }

In the District Court for the First Judicial District in and for the County of Colfax, April Term, 1883.

THE MAXWELL LAND GRANT AND RAILWAY Co. *et al.* }
vs. } Chancery.
GUADALUPE THOMPSON *et al.*

153 Now comes on the above-entitled cause for hearing on the exceptions filed on the 26th day of April, 1880, to the joint and several answer of the said defendants to the said complainants' bill of complaint, as amended, in said cause, and the court having heard the arguments of the solicitors for the said complainants, as well as for the said defendants, and being fully advised in the premises, doth hereby order, adjudge and decree that the said exceptions taken to the following parts of said answer, be and the same are hereby allowed and sustained, to wit:

Commencing with the word "and" in line twenty-eight (28) of page five (5) of said answer, and ending with the word "premises" in line nine (9) of page six (6) thereof, in words and figures as follows:

"And respondents further answering say, that it is not true as alleged in said complaint, that the claim of the said Alfred Bent, and after his death the claim of the infant respondents herein, in and to their undivided interest in said grant and premises, *nor* ever regarded by them or either of them as a doubtful or uncertain claim, but on the contrary aver that at the time of the alleged agreement and compromise the same was a valid and subsisting claim and right, confirmed and established by the decree of the court in the said proceeding for partition of the said grant and premises."

Also all that part of said answer commencing with the word "and" in line nineteen (19), page six (6), of said answer, and *in* reciting in words and figures as follows, to wit:

"And therefore allege that all of the said proceedings were illegal, unjust and void as to these minor respondents, Charles Bent, Julian Bent and Alberto Silas Bent."

154 Also, all that part of the said answer commencing with the word "and" in line 1 of page 7, and ending with the word "maintenance" in line 29 of the same page, and reciting in words and figures as follows, to wit:

"And respondents further deny that the said decree setting aside

the former decree establishing the right and interest of the said Alfred Bent was ever made at the request and with the consent of the solicitors or their respondents, or any of them, or of the said Alfred Bent, nor did their infant respondents or any one having authority to represent them, ever authorize any solicitor or solicitors, to consent to any decree for the transfer or surrender of their rights as alleged in the complaint herein, and defendants further answering say that the said pretended agreement and proceeding were fraudulent as to these infant respondents, and involved an unjust ruinous and illegal sacrifice of their just and valid rights. That their interest in said grant or premises, alleged to have been sold, released or surrendered as aforesaid, for the sum of six thousand dollars, was at that time worth not less than one hundred thousand dollars, and is now worth a much greater sum. That said alleged settlement and compromise was not in any way beneficial or advantageous to these infants respondents, or necessary to their support, or maintenance."

Also, all that part of the said answer commencing with the word "respondents," in line 10 of page 8, thereof, and reciting in words and figures as follows, to wit:

"Respondents deny that the said sum of six thousand dollars has ever been paid to the said respondent Guadalupe Thompson, as administratrix of the estate of Alfred Bent, deceased, 155 or that the same has ever been paid to her at all; but admit that a portion of the said sum of six thousand dollars, not to exceed the sum of one thousand dollars, may have been paid to her as guardian *ad litem*. Said payment of the sum of one thousand dollars, or thereabouts, if made at all, being made to her in personal property and not in cash, respondents averring that neither the estate of Alfred Bent, deceased, nor these infant respondents have ever received any portion whatever of the said sum of one thousand dollars. But these respondents say that should it be made to appear upon the hearing of this cause, that the said Guadalupe Thompson, as administratrix of the estate of Alfred Bent, deceased, or any one legally representing her, or these minor respondents, ever received the said sum of six thousand dollars, or any part thereof, for the purposes and in pursuance of the alleged agreement as set forth in the complaint, that they are now ready and willing, and here offer to repay the same to the said Maxwell or his legal representatives, upon such just and equitable terms as the court may prescribe."

Also all that part of said answer commencing with the word "and" in line 22 of page 9 of said answer, and reciting in words as follows, to wit:

"And respondents further aver that the said alleged deed was procured from the said Guadalupe Thompson through deceitful practices and fraudulent representations upon the part of the said Maxwell and others confederating with him to that end."

Also all that part of said answer commencing with the word "and" in line 21, page 10, thereof, and reciting in words as follows, to wit:

156 "And the said respondents aver that the said pretended order and decree setting aside the prior decree, establishing and confirming the right and interest of the said Alfred Bent in and to the said grant and premises, were obtained by fraud and deceitful practices upon the part of the said Maxwell."

And also all that part of the said answer commencing with the word "respondents" in line 28 of page 10, thereof, reciting in words as follows, to wit:

"Respondents, further answering, deny that the sum of six thousand dollars has ever passed into the hands of the personal representatives of the said Alfred Bent, deceased."

And also all that part of said answer commencing with the word "deny" in line one (1), page one (1), reciting as follows, to wit:

"Deny that the said complainants are entitled to hold said premises, free and discharged of any trust, right or title existing in behalf of the said Alfred Bent or his said minor children and heirs."

And the court doth further order, adjudge and decree that all the aforesaid recited portions of the said answer be and the same hereby are stricken out from the said answer, and that the said exceptions to all the other portions of the said answer be and the same hereby are overruled and denied.

And the said cause coming on for further hearing on the exceptions filed on the 29th day of March, A. D. 1883, to the further answer of the said Charles Bent, one of the defendants to the said complainants' bill of complaint as amended in said cause, and the

157 court having heard the arguments of the solicitors for the said complainants as well for the said complainants as for the said defendant, Charles Bent, and being fully advised in the premises, doth hereby order, adjudge and decree that the said exceptions taken to the following parts of said answer, be and the same hereby are allowed and sustained, to wit:

Commencing with the word "denies" in line fourteen (14) of page two (2) thereof, and reciting as follows:

"Denies that said grantees then or at any time entered into possession of said premises; admits that they entered into some small parts thereof; denies that they or those holding under them have at any time maintained or do now maintain exclusive quiet or peaceable possession of the whole of said tract; avers on information and belief that much the larger part of said grant has been always and until one year last past or thereabouts vacant and unoccupied, and a large part of said grant of lands, is now in the hostile and exclusive possession of others, not holding under said Beaubien and Miranda or either of them."

Also commencing with the word "denies" in line three (3) of page three (3) thereof, and reciting as follows, to wit:

"Denies that by any means whatsoever, the said Lucien B. Maxwell and wife or either of them ever became or at any time were the owners in fee-simple undivided of the whole of said grant with or without the exceptions in the said bill mentioned."

Also commencing with the words "but this" in line twenty-five (25) of page three (3) thereof, and reciting as follows, to wit:

158 "But this defendant denies, that at the time of the said sale and conveyance or either thereof, the said Maxwell and wife, or either of them were seized or possessed of the whole of said premises, though this defendant believes it to be true that the said Maxwell and wife were at that time seized of, and entitled unto a certain undivided interest, to wit, eleven-twelfths of the said grant save in certain parts thereof there-fore conveyed by said Maxwell and wife or one of them, and that said Maxwell, at the date of said conveyance to the said Maxwell Land Grant and Railway Company, was possessed of the said home ranch in the bill mentioned, and certain mining claims, and other small parcels of land situate within the limits of the said grant."

Also commencing with the word- "but this" in line nine (9) of page five (5) thereof, and reciting as follows, to wit:

"But this defendant denies that the said pleadings are lost or destroyed, or cannot be found; on the contrary, this defendant avers on information and belief, that after the exhibition of the said original bill the said pleadings were found, and that certified copies thereof, or what purported so to be, were exhibited in proof at the former hearing of this cause."

Also commencing with the word "avers" in line three (3) of page six (6) thereof, reciting as follows, to wit:

Avers that by the terms of the said decree the undivided one-fourth part of said grant was established and confirmed to them the said Alfred, Estefana, and Teresa, their heirs and assigns forever, with the full and perfect right power and authority to possess and enjoy the same."

Also commencing with the word "but," in line two (2) of page nine (9) thereof, and reciting as follows, to wit:

159 "But this defendant avers on information and belief that the said agreements, and the conveyance of the said Estefana and Teresina, and their said husbands of their interests in the said grant, were procured and entered into by means and by reason of certain fraudulent representations made or procured to be made by said Maxwell unto said Estefana and Teresina or their said husbands, touching the extent, character and value of the said grant."

Also commencing with the word "that," in line two (2) of page ten (10) thereof, and reciting as follows, to wit:

"That on or about the 3rd day of May, 1866, the said Guadalupe Bent, did undertake and assume to convey to the said Maxwell all the right, title and interest of the said minor children of the said Alfred Bent in and to the said grant and premises but this defendant on information and belief avers that the said Guadalupe Bent, now Guadalupe Thompson is a Mexican woman, and at the time of her said appointment as guardian *ad litem* of the said infants, and at the time of the said pretended conveyance of the interests of said infants in said premises unto said Maxwell, and at the time of the entry of the said decree in the said amended bill set forth, setting aside the decree declaring the trust in equity in favor of the said

Alfred, Estefana, and Teresina, and directing partition of the said lands, the said Guadalupe Bent, now Guadalupe Thompson was wholly ignorant of the English language unable to write, read or speak the same, unfamiliar with business, or proceedings of courts of law, unacquainted with the rights of said infants in
160 the premises, or her duties in that behalf as their guardian *ad litem*, and was ignorant of the bounds, or extent, character or value of the said grant, and was ignorant of the fact that the said grant had been confirmed by act of the Congress of the United States, and was ignorant of the entry of the decree of the said district court of the county of Taos, establishing the right of the said Alfred, Estefana and Teresina, in the said grant, and directing partition thereof, and was ignorant of what part or share in said grant was in fact claimed by the said Alfred Bent in his lifetime; that in and about the management of her business, property and affairs, the said Guadalupe Bent was at all the times aforesaid wont to consent with and rely upon the advice of said Aloys Scheurick; that said Scheurick was then residing near to the said Guadalupe Bent, and was always after the death of the said Alfred Bent accustomed to profess great friendship and regard for her and her children and a desire to protect and assist her in the management of the estate and property which had been left by the said Alfred Bent, and to protect the interests of her said infant children; that by reason of these professions of the said Aloys, and the connection in marriage which had subsisted between the said Aloys and the said Alfred Bent in his lifetime, the said Guadalupe Bent at all the times aforesaid, reposed especial trust and confidence in the said Aloys Scheurick; that the said Lucien B. Maxwell was at all the times aforesaid, and long before that as the said Guadalupe and the said Aloys will knew, a man of great wealth and influence, and well knowing the weakness, ignorance and inexperience of the said Guadalupe Bent and her want of information as to the extent, value and character of the said grant, and of the confirmation thereof, and of the decree establishing the
161 right of the said Alfred, Estefana and Teresina in the said grant, the said Lucien B. Maxwell caused and procured the appointment of the said Guadalupe Bent as guardian *ad litem* to the said infants, and caused and procured the pretended conveyance of the right of said infants in the premises to be prepared for execution by the said Guadalupe Bent, and caused and procured the said Aloys Scheurick to believe and represent, and the said Scheurick by procurement of said Lucien B. Maxwell or otherwise did represent to the said Guadalupe Bent that the said grant of lands was for the most part fit only for grazing; that the same contained little or no mineral of value, that the same extended only to the northern line of the Territory of New Mexico; that he the said Maxwell was the owner of the major part of said grant and might, and would control the whole thereof and exclude the said infants from all share or part thereof; that she the said Guadalupe Bent was duly authorized to sell and convey the interest of said infants and that unless she should accept the sum of six thousand dollars therefor, and convey

the same to the said Maxwell neither she nor the said infants would ever realize anything for the interest of said infants in said grant."

Also commencing with the word "this" in line twenty (20) of page thirteen (13) thereof, and reciting as follows, to wit:

"This defendant further answering saith on information and belief, that confiding in the representations of the said Scheurick, not knowing the contrary thereof, and moved and induced by the said representations, and her knowledge of the wealth, power and influence of the said Maxwell, the said Guadalupe Bent did assume to execute the pretended conveyance of the interests of said infants in the said premises unto said Maxwell, as in the said bill of complaint mentioned. This defendant further answering saith on information and belief, that neither at the time of the execution of her said pretended conveyance, nor at any time before that was the said pretended conveyance read or interpreted to the said Guadalupe Bent, that said pretended conveyance was executed without the advice of counsel and at the time thereof, the said Guadalupe Bent was in entire ignorance of the character, extent or value of said grant and of the right and share which said infants had therein."

Also commencing with the word "this" in line seventeen (17) of page fourteen (14) thereof, and reciting as follows, to wit:

"This defendant further answering saith on information and belief, that neither then nor at any time afterwards did the said Lucien B. Maxwell pay to the said Guadalupe Bent in her capacity as guardian *ad litem* for said infants or otherwise, the said sum of six thousand dollars or any sum of money whatever for or on account of the right and interest of the said infant heirs of Alfred Bent in the said grant, nor was any such payment of any sum of money whatever made by said Maxwell to this defendant, or to either of said infants, or to any person authorized to receive the same on behalf of them or either of them."

Also commencing with the word "this" in line three (3) of page fifteen (15) thereof, and reciting as follows, to wit:

"This defendant further answering saith on information and belief, that the before-mentioned grant contains two million acres of land or thereabouts and abounds in valuable mines of gold and silver and other valuable minerals and metals; that the said grant also contains a large extent of — acres or thereabouts, of well-watered, irrigable lands, suitable for cultivation, and extensive forests of pine and other trees, and that all the residue of the said grant of lands is valuable for grazing; that the interest and share of the said infants therein, at the time of the execution of the conveyance thereof to said Maxwell was reasonably worth the sum of one hundred thousand dollars or more, and hath ever since been appreciating in value; that the said grant in fact extends beyond the western boundary of the Territory of New Mexico; that two hundred thousand acres or thereabouts of valuable lands within the limits of the former Territory, and now State of Colorado, are and always were parcel of said grant. All of which on information and belief this defendant shows, was at the time of

procuring the said pretended conveyance well known to the said Lucien B. Maxwell, and was unknown to the said Guadalupe Bent."

Also commencing with the word "this" in line five (5) of page sixteen (16) thereof, and reciting as follows, to wit:

"This defendant further answering saith on information and belief that this defendant's ancestor the said Alfred Bent left a considerable estate in houses and lands, other than the said grant, and in moneys and personal property, and the said Guadalupe Bent, out of the said estate, was then and always afterwards well able to support and educate the said infants, and neither at the times aforesaid, nor at any time, was there any necessity for the sale or other disposition of the interests of said infants in the said grant."

164 Also commencing with the word "this" in line eighteen (18) of page sixteen (16) thereof, and reciting as follows, to wit:

"This defendant further answering, admits on information and belief that at the September term, 1866, of the district court of the said county of Taos, and after the procurement by the said Lucien B. Maxwell of the aforementioned pretended conveyance by the said Guadalupe Bent unto him of the interests of said infants, it was ordered by the said district court that the aforementioned decree declaring the rights and interests of the said Alfred, Estefana and Teresina in the said grant and directing partition thereof, and all orders made under and by virtue of the said decree, should be and were set aside, and that the said Lucien B. Maxwell should pay to the plaintiffs in that said suit the sum of eighteen thousand dollars, to be divided in manner as in the said amended bill mentioned, and that the said Alexander, Estefana, Aloys and Teresina, and the said Guadalupe Bent, guardian *ad litem* as aforesaid, in the name of this defendant, and the said Juliano and Alberto Silas should within ten days from the date of said decree severally execute to and deliver to the said Lucien B. Maxwell good and sufficient conveyances of all their right, title and interest in and to the said premises."

Also commencing with the word "denies" in line thirty (30) of page seventeen (17) thereof, and reciting as follows, to wit:

"Denies that to the information or belief of this defendant, the said Guadalupe Bent, or any solicitor representing her, or either of the said infants, heirs of the said Alfred Bent, ever requested
165 or consented to the said last-mentioned order or decree, or that the said Guadalupe Bent nor any person, on behalf of this defendant, ever consented or agreed, as in the said last-mentioned order and decree is falsely recited, or assented or agreed to the setting aside of the former decree establishing the right of the said Alfred Bent and the said Estefana Hicklin and Teresina Scheurick in the said grant, and directing partition thereof. And this defendant, further answering, saith, on information and belief, that the entry of the said order and decree at the September term, 1866, of the district court of the said Taos county, was procured in the absence of the said Guadalupe Bent, and without notice to her of any intention to apply therefor, and by the false representations of the

said Lucien B. Maxwell, or the said Aloys Scheurick, or some other person or persons to this defendant unknown made to the said district court, that the said Guadalupe Bent, as guardian *ad litem* to the said infants, was consenting to the entry of the said decree as the same was entered at the September term, A. D. 1866, of the said district court, that all and singular the facts hereinbefore set forth, touching the ignorance, weakness and inexperience of the said Guadalupe Bent, and the imposition practiced upon her and the extent and value of the said grant, and the estate, real and personal, left by the said Alfred Bent, and the ability of the said Guadalupe Bent out of the said estate to maintain and educate the said infants, were concealed from the said district court at the time of entry of the said decree, at the September term, 1866, of the said district court, and solely by reason of the said concealment, and the said false representations, the said district court without any

166 reference of the matter to the master, and without any inquiry or judicial examination as to whether the said decree was or would be beneficial to the said infants, the said district court at its said September term, 1866, gave and entered the decree in the said bill of complaint in that behalf set forth."

Also commencing with the word "this" in line thirty (30) of page nineteen (19) thereof, and reciting as follows, to wit:

"This defendant further answering denies, on information and belief, that the said Lucien B. Maxwell on the 3rd day of May, 1866, or at any time paid the said sum of eighteen thousand dollars to the persons, or in the proportions as directed by said decree."

Also commencing with the word "avers" in line six (6) of page twenty (20) thereof, and reciting as follows, to wit:

"Avers, on the contrary that the said decree in the said amended bill last mentioned and set forth, was made and entered more than four months after the said third day of May, 1866."

Also commencing with the word "denies" in line eleven (11) of page twenty (20) thereof and reciting as follows, to wit:

"Denies on information and belief that the sum of six thousand dollars or any sum whatever was ever paid to said Guadalupe Bent in any capacity whatever."

Also commencing with the word "whether" in line sixteen (16) of page twenty (20) thereof, and reciting as follows, to wit:

"Whether the said paper-writings marked B. F. G. and H. in the said amended bill mentioned and referred to are true copies
167 of the said decree and conveyances in that behalf, this defendant cannot state, inasmuch as the defendant hath never had opportunity to examine the originals of either thereof, or to compare the same with the said exhibits."

Also commencing with the word "this" in line eight (8) of page twenty-three (23) thereof, and reciting as follows to wit:

"This defendant is advised that the said decree first in the said bill set forth, the said Alfred Bent in his lifetime became and was fully seized of and entitled unto the equal undivided one-twelfth part of the said grant, and was and is entitled and his heirs-at-law

aforesaid are now entitled to have the same set off and partitioned to *theirs* in severalty."

Also commencing with the word "this" in line nineteen (19) of page twenty-three (23) thereof, and reciting as follows, to wit:

"This defendant is advised that by the said amended bill it appears that the said plaintiffs have not any title to the relief thereby demanded, neither hath this court any jurisdiction to entertain the said bill or to grant the relief thereby demanded, and this defendant craves the same benefit of this defense as if he had demurred to the said bill."

And the court doth further order, adjudge, and decree that all the aforesaid recited portions of the said further answer of the said defendant Charles Bent, be and the same hereby are stricken out from the said answer and the same hereby are denied and overruled.

S. B. AXTELL,

Chief Justice.

April 6th, 1883.

168 And on the day and year last aforesaid there was filed in said clerk's office a replication which is in the words and figures as follows, to wit:

Replication.

TERRITORY OF NEW MEXICO, {
County of Colfax. }

In the District Court for the First Judicial District in and for the County of Colfax, April Term, 1883.

THE MAXWELL LAND GRANT AND RAILWAY Co. *et al.* }
vs. }
GUADALUPE THOMPSON *et al.*

The replication of the said complainants to the joint and several answer of the said defendants to the bill of complaint as amended and to the separate answer of Charles Bent thereto.

These repliants saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answers for replication thereunto, say that they will aver and prove their said bill to be true certain and sufficient in the law to be answered unto; and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in said answers contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things these repliants are and will be, ready

169 to aver and prove, as this honorable court shall direct; and humbly pray as in and by their said amended bill they have already prayed.

T. B. CATRON,
FRANK SPRINGER,
Solicitors for Complainants.

170 And afterwards, to wit: on the 23rd day of October, 1884, there was filed in said clerk's office a decree, which said decree is in the words and figures as follows, to wit:

Decree.

THE MAXWELL LAND GRANT AND RAILWAY COMPANY
and LUZ B. MAXWELL

vs.

GUADALUPE THOMPSON, Administratrix of the Estate of
Alfred Bent; George W. Thompson, Her Husband;
Charles Bent, Julianio Bent, and Alberto Silas Bent. } Chancery.

In the District Court, County of Colfax, Territory of New Mexico,
at Chambers, in Vacation, at Santa Fé, New Mexico.

This cause coming on to be heard on the 22nd and 23rd days of October, 1884, on the mandate from the supreme court of the Territory of New Mexico, the judgment of this court upon said mandate, the pleadings and exhibits and proofs on file herein, and the stipulation on file in this cause, signed by the solicitors of the respective parties, dated the 16th of September, 171 1884, whereby it is agreed that this cause may be heard upon its merits before the judge of this court at his chambers in vacation in the city of Santa Fé, New Mexico, on the 22nd day of October, 1884, and that a final decree may be rendered and enrolled herein with the same force and effect as though rendered and enrolled at a regular term of this court, upon reading the same, and after hearing Frank Springer, Esquire, of counsel for said complainant, and Caldwell Yeaman, Esquire, of counsel for said defendants, and due deliberation being thereupon had, it appears to the court, and the court doth find and declare, that on or about the twelfth day of September, 1859, Alfred Bent and others, commenced a suit in the district court of the Territory of New Mexico, within and for the county of Taos, against Lucien B. Maxwell and others, setting up a claim to an undivided one-fourth part of that certain tract of land now commonly known as the Maxwell land grant, and particularly described and set forth in the amended bill of complaint herein, and praying a partition of said property; that afterwards, in December, 1865, and while said suit was still pending, the said Alfred Bent departed this life, leaving him surviving, a widow, Guadalupe Bent, now Guadalupe Thompson, one of the defendants herein; and three infant children, Charles Bent, Julianio Bent and Alberto Silas Bent, who are also defendants herein; and that afterwards, at the regular April term, 1866, of said court, the said infant children were, by an order of said court, made parties complainant to said suit, and the said Guadalupe Bent, their mother, appointed guardian *ad litem* and commissioner in chancery for said infants, with full power to execute deeds or carry into execution all 172 sales or transfers made of their interest in and to said property to Lucien B. Maxwell.

And the court doth further find and declare that, while said suit so commenced as aforesaid in 1859, was still pending and undetermined in said district court for said county of Taos, and after the death of said Alfred Bent, an agreement by way of compromise was made by the adult parties thereto, including said guardian *ad litem*, for the settlement of the same, and settling and determining all the equities in the same, and that the terms of said agreement and compromise were considered advantageous to said infants, and were accepted by the court for and on their behalf, as is evidenced by the decree attempting to carry into full effect the terms of said compromise.

And the court doth further find and declare that the sum of money which by the terms of said compromise was to be paid by said Lucien B. Maxwell to or for said infants, has by said Maxwell been fully paid in accordance with the terms of said compromise; and that thereby, and by reason of said agreement and compromise, all the right, title, interest and claim either at law or in equity of the said Guadalupe Bent, now Guadalupe Thompson, and of the said infants, Charles Bent, Julianio Bent and Alberto Silas Bent in and to the premises in question, became and were wholly terminated and extinguished.

It is therefore ordered, adjudged and decreed, by the court that the said premises, land and real estate be, and that they now are, held and possessed by the said Maxwell Land Grant and Railway Company, free and discharged of and from any and all trusts, right, title, interest or claim in or to the same in favor of or pertaining to the said Guadalupe Thompson, either in her own right or as administratrix of the estate of said Alfred Bent, deceased, the said George W. Thompson, her husband; the said Charles Bent, Julianio Bent and Alberto Silas Bent, or to any or either of them; and it is further ordered, adjudged and decreed that said complainants pay all costs accrued herein taxed at — dollars.

S. B. AXTELL,
Chief Justice, etc.

October 23, 1884.

174 And afterwards, to wit: on the 23rd day of May 1885 there was filed in the office of the clerk of said court a mandate from the supreme court of the Territory of New Mexico, which said mandate is in the words and figures as follows, to wit: and said mandate appears not to be on file in said clerk's office at the present time.

And on the day and year last aforesaid there was filed in said clerk's office an order, which said order is in the words and figures as follows, to wit:

Order.

TERRITORY OF NEW MEXICO, }
County of Colfax. }

THE MAXWELL LAND GRANT AND RAILWAY CO. *et al.* }
vs. }
 GUADALUPE THOMPSON *et al.*

On reading and filing the mandate of the supreme court of the Territory of New Mexico whereby the decree heretofore given herein, is reversed, and this cause remanded with directions that defendants be permitted to restore to their answers the portions thereof

175 which were stricken out on exception, and thereafter to proceed to final hearing and judgment, and upon hearing Caldwell Yeaman, Esq., and Messrs. Wells, Macon and McNeal

for the defendant and T. B. Catron, Esq., and Frank Springer Esq., of counsel for said plaintiffs, the court being sufficiently advised in the premises, it is ordered and adjudged that the decree of the said supreme court of the Territory of New Mexico be and the same is hereby made the decree of this court, and that the order and decree of this court heretofore made and entered herein as well as the order sustaining the exceptions to the answers of the said defendants be vacated, annulled and from hence for naught held; that the exceptions of the said plaintiffs to the joint and several answers of the said defendants filed herein on the 9th day of April, A. D. 1880, and the exceptions taken by the said plaintiffs to the further answer of the said Charles Bent filed herein on the 6th day of April, A. D. 1882, be and the same are hereby denied.

Ordered that the parts of the said answers struck out upon the said exceptions be and the same are hereby restored to the said answers and each thereof and that the said plaintiffs reply to the said answers in — days hereof; ordered that this cause stand continued until the next term of court.

S. B. AXTELL,
Chief Justice, etc.

176 And afterwards, to wit: on the 26th day of September, 1887, there was filed in said clerk's office a stipulation, which said stipulation is in the words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
Colfax County, } *ss:*

In the District Court of said County. In Equity.

THE MAXWELL LAND GRANT AND RAILWAY CO. *et al.* }
vs. }
 GUADALUPE THOMPSON *et al.*

It is hereby stipulated that all depositions taken or which may be taken, and testimony taken or which may be taken or produced

on behalf of either party in the case of Charles Bent and others against The Maxwell Land Grant and Railway Company and others now pending in this court on the equity side thereof, may be read in evidence so far as relevant and competent on behalf of either party on the final hearing of this cause with like effect as if taken and produced in this cause.

Dated, this April 25th, A. D. 1885.

T. B. CATRON,
FRANK SPRINGER,

Complainant's Solicitors.

C. YEAMAM.
WELLS, MACON & McNEAL.

177 And afterwards, to wit, on the 8th day of May, 1893, a decree in said cause was filed in said clerk's office, which said decree is in the words and figures as follows, to wit:

Decree.

In the District Court for the Fourth Judicial District in and for the County of Colfax.

THE MAXWELL LAND GRANT AND RAILWAY COM-
PANY and LUZ B. MAXWELL

vs.

GUADALUPE THOMPSON, Administratrix of the Estate of
Alfred Bent, deceased; George W. Thompson, Julian
Bent, Charles Bent, and Alberto Silas Bent.

Chancery.
No. 356.

This cause coming on to be heard on the mandate from the supreme court of the Territory of New Mexico, the judgment of this court upon said mandate, the pleadings, exhibits and proofs on file herein, and the stipulation on file signed by the solicitors of the respective parties, dated the 30th day of April, A. D. 1892,

178 the court having at a former day heard full argument of the cause by Mr. Frank Springer of counsel for complainants, and Mr. Caldwell Yeaman and R. T. McNeil of counsel for defendants, and due deliberation having been thereupon had, the court finds the equities of said cause to be with complainants, and that they are entitled to the relief prayed for in the bill of complaint.

It is therefore considered, adjudged and decreed by the court that the said defendants, Guadalupe Thompson, George W. Thompson, Charles Bent, Julian Bent and Alberto Silas Bent have no interest in or title to the lands, premises and real estate in the bill of complaint described either equitable or otherwise, and that the same are now held and possessed by the said Maxwell Land Grant and Railway Company and its assigns, free and discharged of and from any and all trusts, right, title, interest or claim in and to the same in favor of said defendants, or any or either of them; and it is

further ordered, adjudged and decreed that the said complainants pay the costs of this suit to be taxed.

Dated, Las Vegas, New Mexico, this 8th day of May, A. D. 1893.

JAMES O'BRIEN,

Chief Justice, etc.

179 And afterwards, to wit, on July 29, 1895, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an assignment of errors in said cause; which said assignment was and is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, 1895.

CHARLES BENT, JULIANO BENT, ALBERTO
SILAS BENT, Appellants,

vs.

THE MAXWELL LAND GRANT AND RAIL-
way Company, Guadalupe Miranda;
Jesus G. Abreu, as Executor of the
Last Will of Charles Beaubien; Luz B.
Maxwell, Petra Abreu, Jesus G. Abreu,
Her Husband; Juana Clothier and
Joseph Clothier, Her Husband; Pablo
Beaubien, Virginia Keyes and —
Keyes, Her Husband; Peter Maxwell,
Amelia Abreu and — Abreu, Her
Husband; Sophia Jaramillo, Pablito
Maxwell, Odila Maxwell, Benigna
Mares and Vicente Mares, Her Hus-
band; The Unknown Heirs of Joseph
Pley, Deceased; Estefana Hicklin,
Teresina Scheurich, Aloys Scheurich,
Her Husband; Guadalupe Thompson,
The Maxwell Land Grant & Railway
Company, The Unknown Heirs of Leo-
nora Trujillo and of Frederick Miller
and Theodora Miller, His Wife; Cyrus
W. McCormick, and James M. Miller,
Appellees.

No. 581. Appeal from
Fourth District Court,
Colfax County.

Assignment of Errors.

And the said appellants, by Caldwell Yeaman and Wells, Mc-
Neal & Taylor, their attorneys, come now and say that in the record
and proceedings of said district court and the decree given in the
said district court manifest error hath intervened in this, to wit:

That by the record and proceeding of the said district court it
doth appear that the said district court by its final decree
180 herein dismissed the bill of complaint of the said appellants
out of the said district court and decreed that the said ap-

pellants should pay the costs of the said suit, whereas by the law of the land decree ought to have been given in the said district court in favor of the said appellants and according to the prayer of the bill of complaint herein.

Wherefore, for the errors aforesaid and the manifold other error in the said record and decree appearing, appellants pray that the decree of the said district court may be reversed, annulled, and altogether held for naught, and they also pray judgment for their costs.

CALDWELL YEAMAN,
WELLS, McNEAL & TAYLOR,
Attorneys for Appellants.

And afterwards, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on the last Monday in July, 1895, on the thirtieth day of said term, the same being Wednesday, October 9, 1895, the following, among other, proceedings were had, to wit:

THE MAXWELL LAND GRANT AND RAIL- WAY COMPANY <i>et al.</i> , Appellees, <i>vs.</i> GUADALUPE THOMPSON <i>et al.</i>	}	581. Appeal from Colfax County.
--	---	------------------------------------

This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, the court, being now fully advised in the premises, announces its decision by Associate Justice Collier affirming the decree of the court below, Associate Justices Laughlin, Hamilton, and Bantz concurring. It is therefore ordered, adjudged, and decreed by the court that the decree of the district court in and for the county of Colfax, whence this cause came into this court, be, and the same hereby is, affirmed, and that this cause be, and the same hereby is, remanded to said district court, with directions to carry said decree into effect; and it is further ordered, adjudged, and decreed by the court that said appellants pay all costs in this behalf expended, to be taxed, and that execution issue therefor.

And afterwards, at the term of said supreme court last aforesaid, one the thirty-fifth day thereof, the same being Tuesday, October 15, 1895, the following, among other, proceedings were had, to wit:

181 THE MAXWELL LAND GRANT and Railway Company <i>et al.</i> , Appellees, <i>vs.</i> GUADALUPE THOMPSON <i>et al.</i> , Appel- lants.	}	581. Appeal from District Court of Colfax County.
--	---	--

Now come the said appellees, by their solicitor, Frank Springer, Esq., and the said appellants come by their solicitor, R. T. McNeal,

Esq., and said appellants pray an appeal from the judgment and decree of this court in this cause to the Supreme Court of the United States, and the court, being sufficiently advised in the premises, grants said motion. It is therefore considered and adjudged by the court that said appellants be, and they hereby are, allowed an appeal from the judgment and decree of this court in this cause to the Supreme Court of the United States; and it is further ordered by the court that said appellants enter into a good and sufficient bond to appellees in the sum of five hundred dollars, with sureties to be approved by the clerk of this court, conditioned for the payment of all costs in connection with this appeal; and thereupon the court makes and certifies a statement of the facts herein for the purpose of such appeal and orders that the same be made a part of the record in this cause.

And afterwards, to wit, on the 15th day of October, 1895, there was filed in the office of the clerk of said supreme court the findings of fact made and certified by the court in said cause; which said findings of fact are in the words and figures following, to wit:

182 In the Supreme Court of the Territory of New Mexico, July Term, 1895.

CHARLES BENT <i>et al.</i> , Appellants,	}	No. 579.
<i>vs.</i>		
GUADALUPE MIRANDA <i>et al.</i> , Appellees.		

THE MAXWELL LAND GRANT AND RAILWAY COMPANY	}	No. 581.
<i>et al.</i> , Appellees,		
<i>vs.</i>		
GUADALUPE THOMPSON <i>et al.</i> , Appellants.		

Now, on this day, come the appellants, by their counsel, and move the court to make and certify a statement and finding of the facts for the purpose of an appeal to the Supreme Court of the United States, and thereupon the court grants said motion.

And the court now, being sufficiently advised and pursuant to the statute in such cases made and provided, does make and certify the following as a statement and finding of the facts proven and established by the evidence in each of the above-entitled causes, to wit:

In the year 1841 a grant of land was made by the Mexican government to Charles Beaubien and Guadalupe Miranda of a tract of land situate in the present Territory of New Mexico and which afterwards came to be and now is commonly known as the Maxwell grant. They were placed in possession of it in 1843. The grant was confirmed by act of Congress approved June 21st, 1880. In September, 1859, Alfred Bent and his two sisters, Estefana, wife of Alexander Hicklin, and Teresina, who soon after became the

183 wife of Aloys Sheurich, set up a claim to one-third undivided interest in the said grant in the right of their father, Charles

Bent, who had died in 1847. They began an action in chancery in the district court of the Territory of New Mexico in and for the county of Taos against Beaubien, Miranda, L. B. Maxwell, and Joseph Pley, by filing their original bill September 12th, 1859, in words and figures following:

DOCUMENTARY EVIDENCE.

EXHIBITS "A," "B," "C," "D," "E," "F," "G," AND "H," ANNEXED TO BILL.

Bill of Complaint in the Suit of Alfred Bent and Others Against Charles Beaubien and Others.

UNITED STATES OF AMERICA, }
Territory of New Mexico, County of Taos, }⁸⁸:

In the United States District Court for the 2nd Judicial District of the Territory of New Mexico, September and October Term, A. D. 1859.

To the Honorable William G. Blackwood, presiding judge of said district court, in chancery sitting:

Humbly complaining, show unto your honor, your orator and oratrixes, Alfred Bent, Estefana Hicklin, and her husband Alexander Hicklins, and Teresa Bent, a minor, by her next friend, Ceran St. Vrain, of the county of Taos, Territory of New Mexico, that Charles Bent, of the county of Taos, deceased, the late father of your orator and oratrixes, Alfred Bent, Estefana Hicklin and Teresa Bent, was in *her* lifetime the owner in right and equity, of the undivided one-third part of a certain "merced" or grant of lands made by the Mexican government, in or about the year 1843, in due form of law, to Guadalupe Miranda and Charles Beaubien, which said grant or "merced" of lands is situated, lying and being in the said county of Taos, on the rivers known as the Rayado, Ponie Vermejo, Cimarron Cito and Colorado, and known as the "Rayado grant;" and the said deceased being entitled to be seized as owner of the one undivided third part of the lands aforesaid, did depart this life the year 1844, leaving your orator and oratrixes coheirs and heiresses him surviving; and upon his death the said one undivided third part of said lands should have descended upon and should have come to your orator and oratrixes, the said Alfred Bent, Estefana Hicklin and Teresina Bent; and your orator and oratrixes further show unto your honor that though the name of our late deceased father, Charles Bent, does not appear as one of the grantees of the said "merced," yet it is a fact of common notoriety that the said grant was obtained from the late Mexican government mainly by his exertion, influence and instrumentality, and that the said Miranda and Beaubien, the grantees named in the documents of the grant or "merced" from the said Mexican government aforesaid, have never denied, but have confessed and ac-

known in the presence of numerous persons, that our father, and late Charles Bent, deceased, had equal right with the said — — was fully and entirely with themselves equal owners in his lifetime of the one undivided third part of the said grant of land, and that such was the verbal understanding in all good faith between our deceased father and said grantees; and further your orator and oratrixes show unto your honor that since the death of their late father, Charles Bent, they, the said grantees of the said tract of land granted as aforesaid, have confessed and acknowledged, in the presence of witnesses, the fact notoriously known that your orator and oratrixes, as the coheirs and heiresses of the said Charles Bent, deceased, are entitled to the one undivided third part, all of which your orator and oratrixes is prepared to verify by sufficient and competent testimony.

And your orator and oratrixes further show unto your honor that they have frequently applied to and requested the said Guadalupe Miranda and Charles Beaubien to join and concur with your orator and oratrixes in making a fair, just and equal partition of the said premises between them, the said defendants, Guadalupe Miranda and Charles Meaubien and others now holding under the same and wrongfully and to the injury of your orators and oratrixes, occupying to their own exclusive use the said lands hereinbefore described, that there should be a just and equitable division of one-third of said property to each the said Guadalupe Miranda and to the said Charles Beaubien and their respective assigns, and the other third to your orator and oratrixes to be allot-ed, held and enjoyed jointly by them. And your orator and oratrixes well hoped that the said Guadalupe Miranda and Charles Beaucien and their assigns would have complied with such, their reasonable request as in justice and equity it ought to have been.

But now so it is, may it please your honor, that the said Guadalupe Miranda and Charles Beaubien, combining and confederating to and with Lucien B. Maxwell, Joseph Pley, and with divers other persons, at present unknown to your orators and oratrixes, whose names when discovered your orators and oratrixes pray they may be at liberty to insert herein with apt words to charge them as parties defendants hereto, as are hereby charged; the said Guadalupe Miranda, Charles Beaubien, Lucien B. Maxwell and Joseph Pley, and as contriving how to wrong and injure your orators and oratrixes in the premises. They, the said Guadalupe Miranda, Charles Beaubien and others herein made defendants, absolutely refuse to comply with such request, and they the said defendants at times pretended that your orators and oratrixes have no right to said one undivided third of said property or offer them with interest to defraud and wrong your orators and oratrixes, such parts of said grant of lands as they are comparatively valueless, in comparison to those parts of said lands now occupied and used for the sole behoof and benefit of the said defendants, regardless of the first rights of your orators and oratrixes. And as whereas your orators and oratrixes charge, and so the truth is, that a fair and just partition for said grant of land, according to the intent thereof,

and according to equity, right and good conscience, will tend greatly to the benefit and advantage of your orators and oratrixes as well as them, the said defendants, in defining what the rights of all the parties hereto actually are, but they the said defendants under divers, frivolous pretenses, absolutely refuse to join or concur with our orators and oratrixes therein.

All which actions, doings, pretenses and refusals are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator and oratrixes in the premises.

187 In consideration whereof, and forasmuch as your orator- and oratrixes can only have adequate relief in the premises in a court of equity, where matters of this nature are properly cognizable and relievable. To the end therefore that the said Guadalupe Miranda, Charles Beaubien, Lucien B. Maxwell and Joseph Pley, and other persons now unknown, when discovered, their confederates when discovered, may, upon their several and respective corporal oaths, to the best and utmost of their several and respective knowledge, remembrance; information and belief, true, direct and perfect answers make to all and singular the matters aforesaid; and that as fully and perfectly as — the same were here repeated, and they and every of them distinctly interrogated thereto, and more especially that the said confederates may, in manner aforesaid; answer and set forth whether the said orators and oratrixes have not a full and equitable one-third part or share — may be allotted and conveyed unto your orators and oratrixes, Alfred Bent, Estefana Hicklin and her husband, Alexander Hicklin, and Teresina Bent, a minor in charge to her first friend, Ceran St. Vrain, and their heirs and assigns.

That one other full and equitable third part or share may be allotted and conveyed to the said Guadalupe Miranda, his heirs and assigns, and a like equal one-third part to the said Charles Beaubien, his heirs and assigns, who are the defendants in this suit, and that your orators and oratrixes, Alfred Bent, Estefana Hicklin and her husband, Alexander Hicklin, and Teresa Bent, a minor, by her first friend, Ceran St. Vrain, may hold and enjoy their said joint allotment of one equal and full third part of

188 said premises according to the nature thereof, jointly, and that all proper and necessary conveyances and assurances may be executed for carrying such partition into effect, and that your orators and oratrixes may have such further or other relief in the premises as the nature of the circumstances of this case may require, and to your honor shall seem meet. And may it please your honor to grant to your orator- and oratrixes a writ of subpoena, to be directed to the said Guadalupe Miranda, a resident of Donna Ana county, Charles Beaubien, Lucien B. Maxwell and Joseph Pley, residents of the county of Taos, thereby commanding them on a certain day and under a certain pain therein to be limited, personally, to be and appear before your honorable court, and then and there full, true, direct and perfect answers make to all and singular the premises; and further to stand to, perform and abide such fur-

ther order, direction and decree therein as to your honor shall seem meet and your orator- and oratrixes shall ever pray, etc.

SMITH & HOUGHTON, *Solicitors*.

The affiant, Alfred Bent, one of the complainants in the foregoing bill, on his oath, declares that the matters and things therein set forth, so far as they come within his own knowledge, are true; and that so far as he has been informed of the same by others, he believes them to be true.

ALFRED BENT.

Sworn and subscribed to before me this twelfth day of September A. D. 1859.

[SEAL.]

JAMES BARRY, *Clerk*.

189 A general demurrer to this bill was interposed and over-ruled April 12th, 1860.

Afterwards, on May 8th, 1860, said complainants filed their amended bill as follows:

TERRITORY OF NEW MEXICO, }
Second Judicial District, County of Taos. }

District Court, April Term, 1860.

The amended bill of complaint of Alfred Bent, Estafana Hicklin, wife of Alexander Hicklin, and Alexander Hicklin, her husband, and Teresina Bent, by Ceran St. Brain, her next friend, all of the county and district aforesaid, against Charles Beaubien, a resident of said county of Taos, and Lucien B. Maxwell and Jose Pley, of the county of Mora, in said district, and Guadalupe Miranda, a resident of the county of Donna Ana, in the Territory aforesaid.

To the Honorable William G. Blackwood, presiding judge of said district court, in chancery sitting:

Humbly complaining, your petitioners, Alfred Bent, Estafana Hicklin and Teresina Bent, by her next friend, Ceran St. Vrain and Alexander Hicklin, the husband of Estafana Hicklin, sheweth unto your honor that in or about the year A. D. one thousand eight hundred and forty-three, Guadalupe Miranda and Charles Beaubien, who are prayed to be made parties defendants to this bill of complaint, desired to obtain a grant of lands from the Mexican government, and applied to one Charles Bent, the natural father of your petitioners, Alfred Bent, Estefana Hicklin and Teresina Bent, for his aid and assistance and influence in obtaining for them said grant of lands, agreeing with the said Charles Bent that if the said Charles Bent would lend his aid, assistance and labor in and about the procuring said grant of lands from the Mexican government, that they, the said Beaubien and Miranda would, in consideration thereof, give to him, the said Charles Bent, one undivided third interest in said lands when so obtained.

Your petitioners would further show unto your honor that, at the solicitation of the said Beaubien and Miranda, that said Charles Bent did, in consideration of the proposition so made by the said defendants to him, lend his services, influence and means in and about the prosecuting the application of the said Beaubien and Miranda for a grant of lands from the Mexican government, and by the labor, services, means and influence of him, the said Charles Bent did, about the year aforesaid, to wit, 1843, obtained from the Mexican government a grant or merced of lands in due form of law, granting to the said Beaubien and Miranda a certain district of country situated in the district aforesaid and commonly called and known as the Rayado grant, a copy of which grant is hereto annexed, marked Exhibit "A," and prayed to be taken as a part of this bill, with leave to refer thereto as often as may be necessary.

Your petitioners would further show unto your honor that after said grant or merced was obtained, and the said Beaubien and Miranda were placed in possession thereof, they, the said Beaubien and Miranda, acknowledged the great services rendered them by the said Charles Bent, and also that the said Charles Bent had an equal interest in said grant of lands with themselves.

Your petitioners further show unto your honor that in the year A. D. one thousand eight hundred and forty-seven, the said Charles Bent departed this life leaving no legitimate descendants of his body, but leaving your petitioners, Alfred Bent, Estefana Bent, who afterwards intermarried with Alexander Hicklin, and Teresina Bent, his natural children and heirs to his estate, and left no other heirs descendants of his body.

Your petitioners further show unto your honor that after the decease of the said Charles Bent, the said Beaubien and Miranda, contriving to deceive and defraud your petitioners of their rights as heirs-at-law of the said Charles Bent, and well knowing that your petitioners, Alfred Bent, Estefana Hicklin and Teresina Bent were the only rightful heirs to the interest of said Charles Bent, deceased, and well knowing that the said Charles Bent at the time of his death was rightfully entitled to an interest of one undivided third part of said grant or merced of lands when applied to by your petitioners as the legal heirs and descendants of said Charles Bent, to make an equitable division of said lands between them, the said Beaubien and Miranda, and your petitioners as the heirs of the said Charles Bent, deceased, each taking share and share alike; that is to say, the said Beaubien the one undivided third part, the said Miranda the one undivided third part, and your petitioners, Alfred Bent, Estefana Hicklin and Teresina Bent, one undivided third part among them as the heirs-at-law of said Chas. Bent, deceased, offered your petitioners such part of said grant only as to them were valueless, and comparatively so to your petitioners. The said Beaubien and Miranda still holding out inducements to your petitioners that they would make a fair and equitable division of said grant with them in accordance with the agreement made with the said Charles Bent deceased.

But so it is, may it please your honor, that as often as your peti-

tioners have applied to the said Beaubien and Miranda for a fair and equitable division of said lands, they have acknowledged the rights of your petitioners, but contriving to defraud your
 192 petitioners in the premises, have repeated to them the same offers, hoping thereby to induce your petitioners not to assert their rights in a court of equity.

Your petitioners further show that the said Bea-bien and Miranda, not regarding their obligation to the said Charles Bent, deceased, nor the right of your petitioners as the *one* heir- of said Bent, have sold to one Lucien B. Maxwell and Jose Pley, large tracts of land within the boundaries of said grant, who have taken possession thereof, and are now in the enjoyment of the same, regardless of the rights and interests of your petitioners, the said Lucien B. Maxwell and one Jose Pley are now combining and confederating with the said Beaubien and Miranda to defraud and cheat your petitioners out of their just right, and interests in said grant or merced of land.

Your petitioners therefore pray that the said Lucien B. Maxwell and Jose Pley may be made parties defendant to this their bill of complaint.

And now may it please your honor, that since your petitioners are not willing to accept from said Beaubien and Miranda, such parts of said grant of land as they are willing to give them in satisfaction of their interest as heirs of law of the said Charles Bent, deceased, wholly and entirely refuse to make any partition of said lands with your petitioners, all of which pretences and refusals are contrary to equity and good conscience, and tending to the manifest wrong and injury of your petitioners in the premises.

In consideration whereof, and forasmuch as your petitioners can have adequate relief in a court of equity only; therefore that the said Charles Beaubien Guadalupe Miranda, Lucien B. Maxwell and Jose Pley and all other persons, their confederates when discovered, may upon their respective corporal oaths, full, true and correct answers make unto all and singular the allegations in this bills contained, and upon the premises being found true, and that

193 your petitioners are justly entitled to one undivided third part of said grant, that an account may be taken of all the rents and profits of said lands under the direction of this honorable court, and that a just and equitable partition of all the lands in said grant or merced, be made between the parties interested therein, and that your honor appoint a commissioner to convey the one undivided third part of said lands to which your petitioners may be entitled as well in value and interest as in quantity to them. And that this honorable court may decree to your petitioners according to their respective rights, their said portion or interest in and to said grant or merced, and to their heirs in fee-simple forever, and that your honor will grant such other and further relief as in equity and in good conscience your petitioners may be entitled to, and your petitioners will ever pray, etc.

ASHURST & TOMPKINS,
Solicitors for Complainants.

194 After demurrers had been interposed and overruled the defendants answered the bill. Miranda's answer was made May 15th, 1860, as follows:

And be it further remembered, that with the papers filed in this cause, as found, the following paper, purporting to be an answer of the defendant, Guadalupe Miranda, to the bill of complaint herein, which answer is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Taos. }

In the District Court, September Term, A. D. 1860.

ALFRED BENT *et al.*, Heirs of Charles Bent, } Bill in Chancery for
vs. } Partition, etc.
CHARLES BEAUBIEN *et al.*

The answer and disclaimer of Guadalupe Miranda, one of the defendants, to the bill of complaint of Alfred Bent and others against Charles Beaubien, Guadalupe Miranda, and others.

195 This defendant saving and reserving to himself, now and at all times hereafter, all manner of advantage and benefit of exception, and otherwise that can or may be had and taken to the many untruths, uncertainties, and imperfections in the said complainants' bill of complaint contained for answer thereto, or unto so much or such part thereof as is material for this defendant to make answer unto, he answers and says that it is true, as charged in plaintiffs' bill, that the sitio of land as described in plaintiffs' bill was granted unto the said Beaubien and himself, as therein alleged, and knows that said Beaubien expressed a desire to invite Charles Bent, deceased, to participate in said grant, or sitio, but knows of no further interest or connection which the said Bent ever had in and to said grant and sitio.

This respondent further saith that he hath heretofore for a consideration, greatly under the value of his original and real interest in and to said grant or sitio sold and transferred by a quitclaim deed, all of his said right, title and interest to Lucien B. Maxwell, one of the defendants in said bill, and therefore saith that he doth fully and absolutely disclaim all manner of right, title and interest, whatsoever in and to said grant or sitio in said bill described and in and to every part thereof, and this respondent doth deny all and all manner of unlawful and fraudulent combination and confederacy, unjustly charged against him in and by the said bill of complaint without that any other matter or thing in said bill contained material or necessary for this defendant to make answer unto and not herein well and sufficiently answered unto, confessed or avoided, traversed and denied, is true, all which matters and things

196 this respondent is ready to aver, maintain, and prove as this honorable court shall award, and humbly prays to be hence

dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

S. M. BAIRD,
Attorney for the Defendant Miranda.

Guadalupe Miranda maketh oath and saith that the matters and things in the foregoing answer are true.

GUADALUPE MIRANDA.

Sworn to and subscribed before me this — day of March, A. D. 1860.

Sworn to and subscribed before me this 15th day of May, 1860.
SAMUEL ELLISON, *Clerk.*

197 Beaubien's answer was made September 6th, 1860, as follows:

Copy of Answer of Charles Beaubien to Foregoing Bill.

UNITED STATES OF AMERICA, }
Territory of New Mexico, County of Taos, ss:

In the District Court for the Second Judicial District in said Territory Held for said County, at September Term, A. D. 1860.

198 ALFRED BENT and Others }
vs. } Chancery.
CHARLES BEAUBIEN and Others. }

And the said Charles Beaubien, saving and reserving to himself all and all manner of exception to the manifold errors, imperfections and uncertainties in the plaintiffs' bill contained for answer thereto, or so much thereof as he is advised, it is sufficient for him to answer, answering, says, that it is true as stated in said petition that the tract of land therein described was granted to said Beaubien and Miranda by the Mexican government at the time mentioned in said bill of complaint, but it is not true that it was obtained by means of the influence of said Charles Bent, nor did he or said Miranda, to his knowledge, ever solicit or apply to said Charles Bent for the use of his influence for the purpose of obtaining the grant aforesaid nor did the said Charles Beaubien or Guadalupe Miranda ever offer to said Charles Bent to give him any portion of said land so granted, in consideration of the aid or influence of said Charles Bent in obtaining the said grant. That the said grant was obtained chiefly by means of the influence of said Miranda, then secretary of the Territory and residing at Santa Fé, a Mexican of intelligence and wealth, and at that time on terms of great friendship and confidence with the Mexican government of the Territory, and also as this respondent believes for the reasons set forth in the petition and stated by the governor in making the donation, as by reference to exhibits filed with plaintiffs' bill will more fully appear; whereas the said Charles Bent was then and up

to the time of his death, a citizen of the United States and resided far from the capital, with few opportunities for intercourse
199 with said Mexican government. That at this time a very warm and cordial friendship existed between the said Charles Bent and this respondent, and this respondent thinks it probable that said Charles Bent may have conversed with the Mexican government in favor of granting him his said claim, but whether he did so or not this respondent does not know. That while his petition was pending before the Mexican government for the grant of land mentioned in said bill, he conversed frequently with said Charles Bent upon the subject, and in one of these conversations told said Charles Bent that if he obtained said grant, he would make him a present of one-fourth part thereof, but did not then state in what part of said tract, nor that it should be an undivided third or fourth part, nor did he so state at any time or in any other conversation with Charles Bent. Neither did said Charles Beaubien or said Miranda, to his knowledge, after said grant was obtained, and they were placed in possession thereof, acknowledge the services of said Charles Bent in the premises or that he had an equal interest with them in said claim. That said Charles Bent did at the time mentioned in said bill of complaint and from the time of the granting of said land up to the time of the death of said Charles Bent, this respondent did not offer nor did said Charles Bent request of this respondent that he would carry into effect the verbal promise aforesaid, by designating the fourth part which this respondent had promised to give to said Charles Bent. That after the death of said Charles Bent this respondent's kind feeling for him and regard for his children, induced in him a desire to benefit them, and knowing
200 them to be his natural children and believing them not to be heirs-at-law to their said father upon that account believing also that by donating the same to said plaintiff, he would be carrying out what he thought would be the wishes of their deceased father; he laid off and designated and offered to donate to said complainants the one-fourth of said tract, at a point at which he considered valuable, but his offer was met by them with a refusal and a claim on their part of one undivided third portion of said tract as a matter of right, which this respondent refused to consider.

Your respondent further states that at the time said grant was made to your respondent and said Miranda, the same was an uncultivated wilderness, surrounded by hostile Indians and for this reason utterly uninhabitable, but that since then it has slowly and gradually become valuable, and this increased value has been caused chiefly by the labor and capital and diligence of this respondent and the defendant, Lucien B. Maxwell, to whom said defendant, Beaubien, had sold a portion of said land, and of other tenants and purchasers under said Maxwell, during the period of years and under circumstances of danger, risk and exposure which few would have undertaken for the original value of said land. And this defendant, Beaubien, here states that he, the said Beaubien, and said defendant Maxwell, Jose Pley and others, tenants and purchasers, as

aforesaid, have expended on said tract of land in labor and capital as aforesaid an amount not less than twelve thousand dollars, and also that said defendants, Beaubien and Miranda, have expended in the defense of the lawsuit referred to in exhibit to complain-ts' bill, as also remunerating the services of counsel before the surveyor of said Territory, in procuring the approval of said claim, the further sum 200½ of two hundred dollars, in all of which expenditures of money, capital and labor so paid out and expended by said defendants Beaubien, Maxwell and others, neither the said complainants nor their said father have ever shared or offered to share, although the same were matters of public notoriety, and this respondent never promised during this long period of time that his kindly and friendly disposition toward said complainants, and their said father was to be repaid by making use of it as a pretext to urge a claim so evidently inequitable and unjust. This respondent also denies all fraud, collusion, confederacy or combination with intent to defraud said complainants of their rights, so unjustly charged upon him in said bill of complaint, without this that any other matter or thing in said bill contained material or necessary for this defendant to answer and not herein well and sufficiently answered, confessed, avoid-, traversed or denied is true, all which matters and things this respondent is ready to aver, maintain or prove, as this honorable court may direct, and humbly to be dismissed with his reasonable costs and charges by him in his behalf most wrongfully sustained, and will ever pray.

BAIRD & WHEATON,
Solicitors for Defendant Beaubien.

TERRITORY OF NEW MEXICO, } ss.:
County of Taos,

Charles Beaubien, having been duly sworn, states that the matters and things set forth and contained in the above answer, as derived from his own knowledge, are true, and those stated as derived from the knowledge of others he believes to be true.

CHARLES BEAUBIEN.

201 Sworn to and subscribed to before me, this 6th day of September, A. D. 1860.

WILLIAM G. BLACKWOOD, *Judge.*

UNITED STATES OF MERICA, }
Territory of New Mexico.

I, William Breeden, clerk of the first judicial district court of said Territory, do hereby certify that the above and foregoing is a true and perfect copy of the original paper on file in my office.

Witness my hand and the seal of said court this 11th day of May, A. D. 1872.

[Seal Jud. Dist. Court, N. M.]

W. M. BREEDEN, *Clerk.*

Copy of Answer of Lucien B. Maxwell.

UNITED STATES OF AMERICA, }
 Territory of New Mexico, County of Taos, } ss :

In the District Court for the Second Judicial District, Held for said County, at September Term, 1860.

ALFRED BENT *et als.* }
 vs. } Chancery.
 CHARLES BEAUBIEN *et als.* }

The defendant Lucien B. Maxwell, saving and reserving to himself all, and all manner of benefit of exception that can or may be taken to the manifold errors, uncertainties and imperfections in plaintiffs' bill contained for answer, thereto or to so much thereof as he is advised is sufficient to answer, answering says: That
 202 it is true as therein alleged that the tract of land therein described was granted to said Beaubien and Miranda by the Mexican government; that it is also true that he now occupies a portion of said land as stated in said bill, and that he occupies it by reason of a purchase made of a portion of the claim of said Charles Beaubien, shortly after the making of said grant and also of a purchase made by him, the said Maxwell, of the whole claim of said Miranda at a more recent period, which will appear more fully by the deeds made by said Beaubien and Miranda to said Maxwell, prayed to be made a part of this answer and be produced whenever they may be hereafter required; that he purchased the same in good faith and for a valuable consideration and has since sold a portion of the same to defendant, Joseph Pley, also for a valuable consideration; that he knows nothing of any contract or agreement between said Beaubien and Miranda and said Charles Bent, such as set forth in said bill, nor does he know of any transactions between said Charles Bent and said Beaubien and Miranda of the character mentioned in said bill of complaint, nor by what influences said grant was obtained by said Beaubien and Miranda from the Mexican government; that he has no other or further claim to said land other than stated in this answer. He also denies all fraud or conclusion or combination or confederation as charged upon him in said bill of complaint, without this that any other matter or thing in said bill contained material or necessary for this defendant to answer, and not herein well and sufficiently answered, confessed, avoided, traversed or denied is true. All which matters and things this respondent is ready to aver, maintain or prove as
 203 this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges by him in this behalf most wrongfully sustained, and will ever pray, etc.

WHEATON.

For Respondent Maxwell.

TERRITORY OF NEW MEXICO, } ss:
 County of Taos,

Lucien B. Maxwell makes oath and say-, that the matter and things above, in his answer set forth and contained, are true.

L. B. MAXWELL.

Subscribed and sworn to before me, this 4th day of September, A. D. 1860.

WM. G. BLACKWOOD,
*Judge of the Second Judicial District of the
 Territory of New Mexico.*

Joseph Pley's answer was made April 7th, 1860, as follows :

Copy of Answer of Joseph Pley.

ALFRED BENT and Others }
 vs. } Chancery.
 CHARLES BEAUBIEN and Others. }

204 In the District Court for the Second Judicial District in the Territory of New Mexico for the County of Taos.

And the said Joseph Pley, saving and reserving to himself all and all manner of right of exception to the manifold errors, imperfections and inconsistencies in the complainants' bill contained for answer thereto, or so much thereof as he has been advised, it is sufficient for him to answer answering, says :

That about the month of June, in the year of our Lord one thousand eight hundred and fifty-nine, he purchased of Lucien B. Maxwell, a portion of the land alluded to and set forth in complainants' bill, including a large part of the land on the River Rayado, bounded as follows: that he purchased the same of said Maxwell in good faith, for a valuable consideration, to wit: the sum of seven thousand dollars, and upon the payment thereof, took possession of the land so purchased, and now resides thereon.

That he knows nothing of the claim of said complainants at the time of said purchase and up to the present time, except as he is informed by the allegations in said bill of complaint. He denies all fraud combination or confederacy as set forth in said bill, and denies all knowledge of the matters and things in said bill contained. Prays to be dismissed with his reasonable costs by him in this behalf most wrongfully sustained.

JOSEPH PLEY.

Sworn to and subscribed before me this seventh day of April, 1860.

WM. G. BLACKWOOD, *Judge.*

205 Replications to these several answers were duly filed, and the cause came to hearing in 1865. No evidence appears in

the record, but the decree which follows recites that the cause was heard upon the pleadings and testimony on file as taken in the cause, the files in said cause having been lost or misplaced, and only the pleadings having been found after the filing of the Maxwell Company's bill in 1870. On June 3rd, 1865, an interlocutory decree was made and entered of record in said cause as follows:

United States District Court, County of Taos, September Term, 1, 1865.

ALFRED BENT, ESTEFANA HICKLIN and ALEX-
ander Hicklin, Her Husband; Teresina
Bent, Alias Teresa T. Bent, and Aloys
Scheurick, Her Husband, and also by Her
Next Friend, Ceran St. Vrain,

vs.

GUADALUPE MIRANDA, JOSEPH POEY, LUZ
Beaubien and Lucien B. Maxwell, Her
Husband, and the said Maxwell; Leonor
Beaubien, Petra Beaubien and Jesus G.
Abreu, Her Husband; Teodora Beaubien
and Frederick Miller, Her Husband; Juana
Beaubien and Joseph Clothier, Her Hus-
band, and Pablo Beaubien, Minor, and the
said Frederick Miller, His Guardian, and
Vidal Trujillo, the Husband of the said
Leonor Beaubien, Defendants.

Bill in Chancery for
Partition of Real
Estate.

And now on this day came the parties by their counsel, and this cause having been at a former term of this court heard upon the bill and amended bill, and the answer thereto, the supplemental bill and the answer, and the testimony herein on file, as taken in this cause, which cause was taken under advisement by the court as to the decree which should be made in the premises, and the court being fully advised, in consideration thereof, therefore, it is ordered, adjudged and decreed by the court that the said complainants, Alfred Bent, Estefana Hicklin, and Teresina, otherwise Teresa T.

206 Bent, be and are hereby declared to be the natural son and daughters of the said Charles Bent in the said bill mentioned, by him begotten upon and conceived and borne of Ygnacio Jamarillo, within the Territory of New Mexico, formerly the department or province of New Mexico, and at the time the said Alfred, Estefana and Teresa were begotten and conceived, no lawful impediment existed to prevent the said Charles Bent and Ygnacio Jamarillo from in due form of law solemnizing a contract of marriage, the one with the other; that as such natural children the said Alfred, Estefana and Teresa, in the absence of any child or heir born in wedlock to the said Charles Bent, became and were at the time of his decease the true and lawful heirs of his body in this Territory, with the full power, right and authority to inherit, succeed to and receive the estate, property, rights and interests of property

of the said Charles Bent in the said Territory, and that as such children and heirs they are justly and lawfully entitled to have, maintain, receive, possess and enjoy all the rights, interest and estate which in law or equity belonged or pertained to the said Charles Bent at the time of his decease, of, in or to the lands, real estate or grant as described and set forth in the complainants' bill and the exhibit therein referred to, which description is as follows, to wit: Commencing below the junction of the Ryado river with the Colorado, thence in a direct line to the east to the first hills, and from thence running parallel with said Colorado river to the north, to a point in front of the junction of the Una de Gato with the said Colorado river, thence following said hills to the east of the said river of the Una de Gato, to the summit of the mesa, thence turning to the northeast along said summit, to the summit of the mountain that separates the waters that flow to the east from those that flow to the west, and from thence following the said mountain to the south of the first ceja, south of the Ryado river, and from thence following the summit of said ceja, east to the place of beginning.

It is further ordered, adjudged and decreed that the said Charles Bent at the time of his decease was justly and equitably entitled and seized of one undivided fourth part of the estate in and to the said tract of land, real estate or grant, and that the said Charles Beaubien and Guadalupe Miranda were at said time so entitled and seized of an equal undivided share of the remaining three-fourths of the said tract or grant.

Furthermore, that the said Alfred, Estefana, and Teresina (alias Teresa T.), upon the decease of their said father, inherited, succeeded to and became seized of the said undivided one-fourth part interest and estate which belonged or pertained to the said Charles Bent in law and equity, in and to the land or real estate in the entire tract or grant aforesaid, at the time of his decease, and that the said Alfred Bent, Estefana and Teresina, are now fully and absolutely entitled to and seized of the undivided one-fourth part of the interest and estate of the said tract of land or grant.

Furthermore, that the said undivided one-fourth part in and to the said tract or grant of land or real estate be and hereby is declared established and confirmed to them, the said Alfred, Estefana and Teresina (alias Teresa T.) and to their heirs and assigns forever, with the full and perfect right, powers and authority to possess and enjoy the same.

It is further ordered, adjudged and decreed that a just and equitable partition be made of the said tract of land or grant between the said Alfred, Estefana and Teresina, and the said daughters and son of the said Charles Beaubien deceased, defendants herein, and Lucien B. Maxwell, the assignee and grantee of the said Guadalupe Miranda, according to the rights, interests and estate hereinabove declared between the respective parties.

Furthermore, that the special commissioners hereinafter appointed to make and allot the said partition shall first take and subscribe an oath before the judge or the clerk of this court,

the clerk of the probate — for the county of Mora, or the justice of the peace within and for the precinct including the county-seat of said county to well and faithfully, without partiality, prejudicial favor or ill will, to the best of their knowledge, understanding, skill and abilities, make a partition and allotment of the said tract of land or grant, between the parties and in the manner or form prescribed and required in this decree, and the said oath so taken and subscribed shall be duly certified by the officer administering the same and by the commissioners, annexed to and returned with the report by them to be made to this court.

That when the oaths shall be so taken and subscribed, the said commissioners shall jointly proceed in person upon the said tract or grant and without any unnecessary delay, and shall inspect the same throughout its extent and especially the streams and springs of water and their capacities, one year with another to supply water for the purpose of irrigating the lands connected with or contiguous to the said streams, susceptible of cultivation and irrigation; the mines and minerals of whatsoever description; the quarries of rock or stones; timber for building, fencing and firewoods; the lands suitable for plowing, planting and sowing; and grounds and — for pasturage.

They shall then make a partition of the said tract or grant, according to quantities, quality and value, and designate and describe the tracts or partitions divided by such descriptions, and natural and artificial objects, or marks or boundaries as shall remain plain and permanent and easily found. They shall part and lay off one-fourth part of the said tract or grant and divide, part and lay off the remaining three-fourths of the same into two equal parts.

209 In making the said partition of one-fourth of the said three-fourths, regard shall be had to the buildings, acequias, cultivation and improvements made by the said Lucien B. Maxwell, upon the said tract or grant of land and nothing shall be credited to the other parties or charged and considered against the said Maxwell for any buildings, acequias, cultivation or improvements made and added to the said grant or tract of land by him or by persons holding and possessing by or through him in good faith. This shall have especial reference to the commencement of this suit upon the twelfth day of September, one thousand eight hundred and fifty-nine, and to the principal places and portions then occupied and improved by him and those by or under him. That in making and allotting the parts therein decreed, ordered and adjudged to be partitioned, the portions which shall be portioned and allotted to the said Maxwell shall include the portions of said tract or grant, which the said Maxwell, or those under or through him, occupied and had cultivated and improved before the commencement of the suit and since continued to occupy and improve, and the chief and principal portions, the said Maxwell has occupied and improved since the commencement of this suit.

In case the said Maxwell since the commencement of this suit has by himself or others in parts of said tract or grant remote from the principal farms and improvements actually occupied by him, made

7076

slight or temporary cultivation or improvements, which shall include the lands and waters in such manner as to leave not an equitable and just portion of the waters and cultivatable land to be parted to the other parties in this cause, then and in such case, the said remote land and waters included in such improvements or slight cultivations, shall in the partition to be made in this cause be considered and included in the said partition, the same as if the

210 said improvements were not made upon the said lands. In such case the commissioners shall assess the just and true value of the land covered by such improvements without their being added to the said lands, and also the said improvements by themselves exceeding the just and true value of them over and connected with the said lands and report the facts with their general report to this court, carefully noting the different assessed values, so that the court may decree justly and equitably concerning the same between the parties.

Furthermore, when the commissioners shall have parted the tract or grant of land as herein provided, they shall allot the one-fourth part to the said Alfred, Estefana and Teresa, (alias Teresa T.) Bent, and an equal portion of the said three-fourths, the one to the said Lucien B. Maxwell, and the other to the said son and daughters of the said Charles Beaubien, deceased.

In estimating the value of any improvements referred to herein, as made in certain remote places, and under the circumstances specified, the commissioners will also assess and report the value of the rents and profits since such places have been occupied and cultivated.

In parting and allotting to the said Maxwell the portion to be allotted to him, the said commissioners are hereby specially charged to estimate in the partition the lands which include the buildings, acequias, farms and other improvements by him made, or by others through or under him, in good faith, without reference to the value of any of the said improvements, that this provision does not extend to the aforesaid remote places and the improvements hereinbefore specially specified as connected therewith.

It is further ordered, adjudged and decreed that Lucien Stewart, of Taos county, and Vicente Romero and William Kroenig, of the county of Mora, in said Territory, be and they hereby are

211 appointed to execute and perform all the requirements and provisions of this decree, required of and to be done by commissioners, and that they make full, plain and exact report of their proceedings to the next term of this court.

Furthermore, it is ordered, adjudged and decreed that the said complainants pay to the said defendants, Maxwell and the said daughters and son of the said deceased Charles Beaubien, the sum of one hundred dollars, the one-fourth part of the amount expended towards the procuring of the confirmation of the said tract or grant of land by the Government of the United States.

The court now reserves and suspend making its decree as the partition and payment of the costs in this cause, until a future term of the court:

It appearing to the satisfaction of this court, upon the suggestion of the complainants, that since the last term of this court, Leonor Beaubien has been regularly and lawfully divorced from the bonds of matrimony before existing between her and the said Vidal Trujillo, it is ordered by the court that he be and hereby is dismissed from these proceedings, and that the clerk furnish a copy of this decree to the said Maxwell and also to the commissioners, and one for the said son and daughters, should these latter require the same, and that this cause stand continued until the next term of this court.

Signed June 3, 1865.

KIRBY BENEDICT,

Chief Justice.

212 The heirs of Beaubien appear as parties defendant in this decree, Beaubien having died in 1864.

The commissioners appointed by the foregoing decree never acted. Maxwell declared that he would appeal the cause, and, if necessary, carry it to the Supreme Court of the United States. Afterwards the Bent heirs, complainants in said suit, entered into negotiations with Maxwell for a compromise of the litigation on the basis of Maxwell paying them a money consideration to relinquish their claim. It was understood between Alfred Bent and Sheurick, with the consent of their wives and Mrs. Hicklin, that either Alfred Bent or Sheurick or both of them should act in the matter as agents to sell Maxwell, if they could, their interests in the grant for the best price they could get, but never less than \$21,000, or what Beaubien's heirs got. Over-

tures for compromise were made by Alfred Bent, acting for
213 himself and his co-complainants, his two sisters and their husbands, in September or October, 1865, when he went to Maxwell's residence, at Cimarron, to try and make a sale of their interest. These were made with the approval of Judge Houghton, one of their counsel, whom Bent consulted about it, and who told Bent he had better settle for himself and the other heirs by compromise rather than to take the award of the commissioners. Bent demanded \$21,000; Maxwell offered \$18,000. Bent returned to Taos, where his family resided, without having affected a definite agreement with Maxwell as to price. The Bents considered the sale as good as made, but Alfred Bent said to his co-complainants that they could get a few thousand more by being quiet a few days, insisting, however, on having as much as the Beaubien heirs got; they then expected to close the bargain in a few days; were ready to make the deeds as soon as the matter was settled, and the deeds had already been written out by Sheurich, husband of Teresina Bent. Before anything further was done in the matter of the proposed compromise Alfred Bent died, in December, 1865, leaving surviving him his widow, Guadalupe Bent, and three infant children, viz., Charles, Julian, and Alberto Silas, aged respectively six, four, and one year, and on April 12th, 1866, said Guadalupe was appointed by the probate court of Taos county administratrix of the estate of Alfred Bent, and duly qualified as such. A few hours be-

fore said Bent was shot, on December 3rd, 1865, he directed one of the commissioners appointed to make partition to proceed therewith as soon as possible, saying he considered his interest and that of his sisters worth \$150,000.

214 Alfred Bent left a will, which was duly probated, which said will and the record of probate thereof and of the inventory and other proceedings connected with said estate are in words and figures following:

Petition of Guadalupe Bent for Appointment as Administratrix.

To the Honorable Pedro Sanchez, probate judge of the county of Taos, Territory of New Mexico:

215 Your petitioner Guadalupe Bent before your honor respectfully represents that on the — day of the month of — A. D. 1865, my deceased husband Alfred Bent made and executed a testament and last will, as in it expressed, I as his wife which I was, am therein named by him as administratrix and executrix of his hereditary goods, in due course of law I appear before you— honor in order that you may be pleased to order that letters of administration of the estate of my husband according to the form of the statute for such cases made and provided offering to execute the necessary and sufficient bonds required by law, and your petitioner will ever pray, etc.

County of Taos, April 12, 1866.

her
GUADALUPE x BENT.
sign.

TERRITORY OF NEW MEXICO, }
County of Taos. }

I Ynocencio Martinez clerk of the court of probate in and for the county of Taos and Territory of New Mexico, do hereby certify that the foregoing part of one page contains a full true perfect and correct copy of the entire and full petition of Guadalupe Bent to the Hon. Pedro Sanchez then judge of probate for said county for letters of administration on the estate of her deceased husband Alfred Bent which said petition now remains on file and on record in the office of said clerk of said court of probate.

In testimony whereof I have hereunto set my hand and
216 affixed the seal of said court of probate within and for the county of Taos this the — day of December, A. D. 1872.

[SEAL.] YNOCENCIO MARTINEZ, Clerk.

Oath of Guadalupe Bent, Administratrix.

TERRITORY OF NEW MEXICO, }
County of Taos, } ss:

Before me the undersigned clerk of the probate court in and for said county personally appeared Guadalupe Bent and under oath declared that Charles Bent, Julian Bent, and Alberto Silas Bent

are the only children of the deceased Alfred Bent her husband late of this county; that she as lawful administratrix of the estate of her said deceased husband would make a true and perfect inventory of all and each of the goods, real property, chattels, animals, debts, rights and claims; pay all the debts of said estate if any should appear; that she would render full account to the probate court whenever she may be so required relative to the management of the administration of said estate; that she would make an equal distribution of the same among the respective legitimate heirs as she may be required, and that in general she would discharge in all things her legal duty as administratrix of the estate until the conclusion of such administration.

her
GUADALUPE (x) BENT.
sign.

Sworn to and subscribed before me, this 12th day of April, A. D. 1866.

YNOCENCIO MARTINEZ,
Clerk of the Probate Court.

[SEAL.]

217 TERRITORY OF NEW MEXICO, {
County of Taos. }

I, Ynocencio Martinez, clerk of the court of probate within and for the county of Taos and Territory of New Mexico, do hereby certify that the foregoing part of one page of writing is a full, complete, correct and perfect copy of the original oath of administration of Guadalupe Bent as administratrix of the estate of Alfred Bent, deceased, taken in full and complete from the said original which remains on file and of record in the office of the said clerk of the court of probate.

In testimony whereof I have hereunto set my hand and affixed the seal of said court of probate this the — day of December, A. D. 1872.

[SEAL.]

YNOCENCIO MARTINEZ, *Clerk.*

Probate of Will of Alfred Bent.

DON FERNANDO DE TAOS, N. M.,
WEDNESDAY, the 6th Day of March, 1867.

At ten o'clock in the forenoon the court met.

Present: The Hon. Pedro Sanches, judge of probate; Leandro Martinez, clerk, and Pablo Martinez, deputy sheriff.

The order of business is as follows:

The administrators of the estate of Alfred Bent, deceased, presented the will of said deceased for approval. The court examined said will and the witnesses in it mentioned, and finding it correct according to law, approved it and ordered that it be recorded in this office.

218 TERRITORY OF NEW MEXICO, } ss :
County of Taos,

I, the undersigned, J. U. Shade, clerk of the probate court of said county, do hereby certify that the above is a true and perfect copy from the record of the proceedings of said court at the March term thereof, 1867, as the same appears in Book C, No. 2, of the records of the said court, on page 253.

Witness my hand and the seal of said court this 3rd day of October, 1884.

[SEAL.]

J. U. SHADE, *Clerk.*

Will of Alfred Bent, Deceased.

In the name of God Amen.

I Alfred Bent, being of sound mind and memory, and knowing the uncertainty of life and the certainty of death do hereby devise and decree as my last will and testament, in the presence of the subscribing witnesses, as follows to wit: first, I give and bequeath unto my wife Guadalupe Long Bent; for the maintainance of her and my three children Charles, William and Silas Bent, all of my real and personal property—money goods and effects after my just debts have been paid which are as follows to wit—to North and Scott of St. Louis the sum of five hundred and sixty-nine dollars with interest; to Mrs. S. Beuthner and L. B. Maxwell sixty dollars—to David Webster the sum of four dollars; which debts I desire shall be paid. I desire that my said wife shall be my executor and may join with her if necessary any person who may desire for her benefit and that of my children heirs as aforesaid.

219 In testimony whereof I have this 9th day of December, A. D. 1865, subscribed my name in the presence of subscribing witnesses.

Witnesses:

Codicil—The debt due North and Scott of the city of St. Louis is jointly due by myself and Horatio Long of Colorado Territory.

(Signed)

ALFRED BENT.

FERNANDO MAXWELL.

W. A. NITTERIDGE.

JOS. S. HURT.

CHARLES HART.

Inventory of the Estate of Alfred Bent, Deceased.

Inventory which contains the goods of the deceased Alfred Bent, late of the county of Taos, commenced this 6th day of March, A. D. 1867.

Half of house, six rooms (at the rancho).....	\$300 00
200 varas of tillable land.....	200 00
27 cows at 20 dollars.....	540 00

8 steers at 20 dollars.....	160 00
90 fanegas wheat at \$2.00 dollars....	180 00
14 fanegas of corn at \$2.00.....	28 00
Money	500 00
By note of Lucien B. Maxwell.....	5,000 00
The eighteenth part of twenty-one miles square of land situated in the Territory of Colorado on the Las Animas river, Huerfano and other small streams, under our oath and having investigated the condition and situation of said land we value it a little more or less at five thousand dollars.....	
220	5,000 00
Total amount.....	\$11,908 00

This inventory was finished this 6th day of March A. D. 1867.

GUADALUPE THOMPSON NÉE LONG,

Administratrix.

YNOCENCIO MARTINEZ AND

JUAN B. LA ROUX, *Appraisers.*

This inventory has been examined and approved this 6th day of March, 1867.

PEDRO SANCHES,

Probate Judge.

TERRITORY OF NEW MEXICO, } ss:
County of Taos,

I certify that the foregoing are true and exact copies of the will and inventory of the estate of Alfred Bent, deceased.

In witness whereof, I have hereunto set my name and the seal of the probate court, this 6th day of March, 1867.

LEANDRO MARTINEZ,

Clerk of the Probate Court.

[SEAL.]

TERRITORY OF NEW MEXICO, } ss:
County of Taos,

221 I, the undersigned J. U. Shade clerk of the probate court of said county hereby certify that the foregoing three pages and five lines contain a full true and perfect copy of the will of Alfred Bent and of the inventory of his estate as the same appears of record in my office in Book B, No. 4, of Records of Wills and Administrations on pages 216 and 217.

Witness my hand and seal of said court this 3rd day of October, 1884.

[SEAL.]

J. U. SHADE, *Clerk.*

Allowance of Account Against Estate of Alfred Bent.

To Guadalupe Thompson, administratrix of Alfred C. Bent, late of the town of El Rancho, in the county of Taos and Territory of New Mexico, deceased :

Take notice that on the first day of the next ensuing term of the court of probate within and for the county of Taos aforesaid I shall

present for allowance against the estate of Alfred C. Bent, deceased a claim for the sum of one thousand seven hundred and ninety dollars, founded on account of which the following is a copy :

TRINIDAD, C. T., Oct. 25, 1867.

Estate of Alfred Bent, dec'd, to Horatio Long, Dr.

1867. To cash had and received \$1,790 00

(Signed)

HORATIO LONG.

TERRITORY OF COLORADO, }
County of Las Animas, } ss :

222 I the undersigned administratrix of the estate of Alfred C. Bent deceased hereby acknowledge service of foregoing notice of demand against the said estate this twenty-fifth day of October, A. D. 1867.

(Signed)

GUADALUPE THOMPSON,

Administratrix of the Estate of Alfred C. Bent, Deceased.

JOSE MA. MARTINEZ.

TERRITORY OF COLORADO, }
County of Las Animas, } ss :

This day personally appeared before me the undersigned a United States commissioner within and for the third judicial district of the Territory of Colorado aforesaid, Horatio Long, and being duly sworn on his oath according to law says that — the best of his knowledge and belief he has given credits to the estate of Alfred C. Bent, deceased, for all payments or offsets to which it is entitled and that the balance there claimed is justly due.

(Signed)

HORATIO LONG.

Sworn to and subscribed before me, this 25th day of October, A. D. 1867.

A. W. ARCHIBALD,

United States Commissioner in and for the Third

Judicial District of the Territory of Colorado.

TERRITORY OF COLORADO, }
County of Las Animas, } ss :

I, the undersigned, administratrix of the estate of Alfred C. Bent, deceased, hereby certify that within my own personal knowledge the foregoing demand of Horatio Long is true in all its particulars, and that the sum of one thousand and seven hundred and ninety dollars is justly due, and I hereby consent to the allowance of a judgment for the same without the necessity for my personal appearance in the said court of probate.

Witness my hand hereunto set this 25th day of October, A. D. 1867.

(Signed) GUADALUPE THOMPSON,
*Administratrix of All and Singular the Goods and Chattels,
 Rights and Credits that were of Alfred C. Bent, Deceased.*

Witness:

JOSE MA. MARTINEZ.

TERRITORY OF NEW MEXICO, } ss :
 County of Taos,

Be it remembered that George Thompson being duly sworn in open court on this 5th day of November, A. D. 1867, on his oath says that he knows the foregoing affidavits, and other parts of the above proceedings were had as recorded; that he personally knows the parties thereto; and was personally present at the execution of the same; and that the same are true in all particulars as above stated.

G. W. THOMPSON.

Sworn to and subscribed in open court at our November term, A. D. 1867.

JUAN SANTISTEVAN,
Probate Judge.

Examined and approved this 5th day of November, A. D. 1867.

JUAN SANTISTEVAN,
Probate Judge.

224 The said will and foregoing record of proceedings in the probate court of Taos county, New Mexico, were not introduced in evidence in the present litigation until at the close of the testimony taken under the Maxwell Company's amended bill and the Bent heirs' bill, in 1866, and after the case of Thompson vs. Maxwell, 3 N. M., 269, had been decided by the supreme court of New Mexico and remanded to the district court.

Beaubien had left six children; Maxwell married one of them, and purchased the interest of the other five for a consideration of not more than \$3,500 each, at the following dates: Juana and her husband, Joseph Clouthier, and Isadora and her husband, Frederick Muller, April 4th, 1864; Eleanor and her husband, Vidal Trujillo, July 20th, 1864; Petra and her husband, Jesus G. Abreu, February 1st, 1867; Paul Beaubien, January 1st, 1870. Muller and Clouthier were merchants residing at Taos; Trujillo and Abreu were farmers, stock-raisers, and also had stores; all four of them, as well as Sheurich and Hicklin, the husbands of Alfred Bent's two sisters, were intelligent men, ranked among the best citizens in their community, and were considered men of wealth and influence.

At the April term, 1866, of the district court for Taos county, and on the 9th day of that month, the death of Alfred Bent was suggested by counsel for complainants in the then pending suit, and,

on their motion, his three infant children, Charles Bent, Julian Bent, and Alberto Silas Bent, were made parties complainant by the following order entered of record in said cause:

225 Be it remembered that at a regular term of the district court for the first judicial district of the Territory of New Mexico, begun and held within and for the county of Taos, on the 9th day of April A. D. 1866, on the second day of said term, among other things the following proceedings were had, and were in the words and figures following, to wit:

ALFRED BENT and Others	}	No. 1. In Chancery.
vs.		
THE HEIRS OF CHAS. BEAUBIEN and Others.		

Now on this day came the complainants by their counsel and suggest to the court the death of Alfred Bent, one of the complainants herein, and moves the court for leave to make Chas. Bent, Julian Bent, and Alberto Silas Bent, his children and heirs, parties complainants herein, which said motion is granted by the court, and the said Chas. Bent, Julian Bent and Alberto Silas Bent, are hereby made parties complainant to this bill of complaint.

And afterwards, to wit, on the fourth day of said term of said court, among other things the following proceedings were had, which are in the words and figures following, to wit:

226 The two last above mentioned orders were made at the instance and in accordance with the wish of said Maxwell or his counsel as necessary to the validity of the conveyance.

Afterwards, at the same term, on motion of solicitors for complainants, an order appointing Guadalupe Bent guardian *ad litem*, etc., was made and entered of record in said cause as follows:

ALFRED BENT and Others	}	No. 1. In Chancery.
vs.		
THE HEIRS OF CHARLES BEAUBIEN and Others.		

By agreement of the parties, the continuance of this cause, made herein on a former day of this term of this court, is set aside, and on motion of solicitors for complainants, Guadalupe Bent — hereby appointed guardian *ad litem*, and commissioner in chancery, for the minors of Alfred Bent, in this cause, with full power to execute deeds, or carry into execution all sales or transfers made of their interest in and to the real estate therein described to Lucien B. Maxwell, one of the defendants in said cause, and this cause stands continued until the next term of this court.

227 In the meantime the negotiations for compromise, which had been interrupted by the death of Alfred Bent, were resumed, the Bent heirs being now represented by Aloys Sheurich, husband of Teresina, one of the adult complainants, who acted in

said negotiations on behalf of his wife, Estefana and her husband, Hicklin, and Guadalupe Bent. A settlement with Maxwell was concluded by Aloys Scheurich, acting for his wife, Mrs. Hicklin and her husband, and Guadalupe Bent as guardian *ad litem* for Alfred's children, which was acceptable to said parties, by which Maxwell was to pay the sum of \$18,000 for the conveyance of the interest or claim of the Bent heirs. The compromise was advised by Merrill Ashurst, the leading counsel for the Bent heirs, the grounds of his advice not being stated. It was accepted and carried out by the adult complainants Teresina and Estefana and their husbands, Sheurich and Hicklin. Sheurich and the other complainants did not consider their claim after the decree of 1865 as being doubtful or uncertain, but made a settlement, one of the reasons therefor being the consideration that the lawsuit involving their interests might drag on a long time and that they were doubtful when the end would be reached, Maxwell having said to Sheurich that he would outlaw them or put them off from court to court, he having means to do so, and having some time before told Sheurich that he paid his attorney \$1,000 to put the case off for six months.

On May 3rd, 1866, in pursuance of said compromise, Guadalupe Bent *née* Long executed a deed to Maxwell for the stated consideration of \$6,000 as follows:

228 (U. S. I. R. S. \$10,000, Taos, N. M., May 3, 1866.)

Know all men by these presents, whereas, I, Guadalupe Bent *née* Long, of the town of El Rancho, in the county of Taos, and Territory of New Mexico, and widow of Alfred Bent, late of the same place, deceased, by virtue of a decree and order of the district court of the United States of America, for the first judicial district, of the Territory of New Mexico, at the April term of said court A. D. 1866, held within and for the said county of Taos, was appointed guardian *ad litem*, and commissioner in chancery for Charles Bent, Julian Bent and Albert Silas Bent, minor heirs of the said Alfred Bent, deceased, as aforesaid; and, whereas, the words of said decree and order of said court are as follows, to wit:

"Territory of New Mexico, First Judicial District Court, County of Taos, April Term, 1866.

ALFRED BENT and Others	}	(No. —.) In Chancery.
<i>vs.</i>		
THE HEIRS OF CHARLES BEAUBIEN and Others.		

"By agreement of the said parties, the continuance of the cause made herein on a former day of the present term of this court, is set aside, and on motion of solicitors for complainant, Guadalupe Bent is hereby appointed guardian *ad litem*, and commissioner in chancery for the minor heirs of Alfred Bent in this cause, with full power to execute deeds; or carrying into execution all sales or transfers made of their interest in and to the real estate therein

described, to Lucien B. Maxwell, one of the defendants in said cause, and that this cause stand continued until the next term of this court," all of which proceedings so had as aforesaid, will

229 fully appear by the records of said court, to which reference is hereby made. Now, therefore, by reason of the premises,

and by virtue of the power and authority on me conferred by the said decree, I, Guadalupe Bent, guardian *ad litem*, and resident as aforesaid, for and in consideration of the sum of six thousand (\$6,000) dollars to me in hand paid by the said Lucien B. Maxwell, of El Cimarron, of the county of Mora and Territory of New Mexico, the receipt of which is hereby acknowledged, have granted, bargained and sold, conveyed, confirmed and transferred, as by these presents, I do grant, bargain and sell, convey, confirm and transfer unto the said Lucien B. Maxwell, his heirs and assigns, the following-described real estate, situate, lying and being in the aforesaid county of Mora, and Territory of New Mexico, and known and described as the "Rayado grant," heretofore granted to Charles Beaubien, and Guadalupe Miranda by Governor Armijo, on the eleventh day of January, A. D. 1841, and which is bounded and described as follows, to wit: Beginning on the east bank of the Rio Colorado at a mound of rocks; thence running in a straight line eastward to the first hills to another mound of rocks; thence continuing from south to north on a parallel line with the River Colorado to the third mound of rocks on the northern edge of the tablelands of Chicouca O'Chacuaco; thence running westward and following the edge of the said tablelands of Chacuaco to the top or comb of the Sierra Madre, to the fourth mound of rocks; thence from north to south, following the top of the said Sierra Madre to the Cuesta del Osha, one hundred (100 v.) varas, to the north of the road to Fernandez and to the Laguna Negra to the fifth mound of rocks; thence running anew to the east towards the Rio Colorado, and following the southern edge of the tablelands of Rayado and Gonzalitos to the eastern point of these tablelands to the sixth mound of rocks; and thence following in a northerly direction until the said line strikes the Rio Colorado on the western bank of said river, where the seventh mound of rocks was placed.

230 To have and to hold the one undivided one-twelfth (one-12th) interest, of, in and to the above-described real estate, together — all and singular, the rights, immunities, hereditaments, privileges and appurtenances thereunto belonging or in anywise appertaining unto the said Lucien B. Maxwell, and his heirs and assigns forever; the said one-twelfth undivided interest being the entire interest, estate, claim and demand of the said Charles Bent, Julian Bent and Alberto Silas Bent said minor heirs of their father, said Albert Bent, deceased, of, in and to the real estate as a child, and one of the heirs of Charles Bent, Senior, late of the Territory of New Mexico, deceased; and I, the said Guadalupe Bent, guardian *ad litem*, do hereby covenant to and with the said Lucien B. Maxwell, his heirs and assigns, that the above-described interest hereby conveyed of, in and to the said real estate, is free and clear from all incumbrances,

and that I, my heirs, executors and administrators, shall and will warrant and defend the title to the same unto the said Lucien B. Maxwell, his heirs and assigns forever, against the lawful claims or demands of all persons whomsoever.

In witness whereof, I have hereunto set my hand and seal this third day of May, A. D. eighteen hundred and sixty-six.

GUADALUPE BENT NÉE LONG, [SEAL.]

Guardian ad Litem of Charles Bent,

Julian Bent, and Albert Silas Bent.

Signed, sealed and delivered in presence of—

ADOLPH LETCHER.

WM. BLACKWOOD.

TERRITORY OF NEW MEXICO, }
County of Taos, } ss :

Be it remembered that on the third day of May, A. D. 231 eighteen hundred and sixty-six, personally came before me the undersigned clerk of probate, within and for the county aforesaid, Guadalupe Bent née Long, who is personally known to me to be the same person whose name is subscribed to the foregoing deed of conveyance as party thereto, and she acknowledged that she executed the same as her free and voluntary act and deed, for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed the seal of the said court the day and year last above written.

[Seal Probate Court, Taos County, N. M.]

INOCENCIO MARTINEZ,

Clerk of the Court of Probate for the County

of Taos, Territory of New Mexico.

Filed at 3 o'clock p. m. January 16, 1870.

J. LEE, *Clerk.*

TERRITORY OF NEW MEXICO, }
County of Colfax, } ss :

I, the undersigned, clerk of the probate court and *ex officio* recorder for said county, Territory aforesaid, do hereby certify that the foregoing is a true and correct — of the instrument as recorded in my office. Deed Book "A," pages 78, 79, 80, and 81.

Witness my hand and official seal, this first day of September, A. D. 1870.

[Seal Probate Court, Colfax Co., N. M.]

JOHN LEE,

Clerk Probate Court and ex Officio Recorder.

232 No other conveyance was made by Guadalupe Bent, the said conveyance having been prepared by counsel for Maxwell after one dictated by counsel for the Beaubien heirs.

On the same day Teresina Sheuruch née Bent, daughter of Charles

Bent and sister of Alfred Bent, executed to Maxwell a like conveyance, conveying a like interest for the recited consideration of \$6,000, with like covenants; and afterwards, on May 31st, 1866, Estefana Hicklin, also a sister of Alfred Bent and daughter of Charles Bent, joined by her husband, Alexander Hicklin, executed to Maxwell a like conveyance of a like interest for a recited consideration of \$6,000, with like covenants.

Afterwards, at the September term, 1866, of the said district court for Taos county, on September 13th, 1866, a decree was made and entered of record in said cause as follows:

And afterwards, to wit, at the September term of said court, 1866, begun and held on the 10th of said month of September, and on the 3rd day of said term of said court, among other things the following proceedings were had, which are in the words and figures following, to wit:

GUADALUPE BENT, Guardian *ad Litem* for
Charles Bent, Julian Bent, and Alberto
Silas Bent, Minor Heirs and Children of
Alfred Bent, Deceased; Alexander Hicklin
and Estefana Hicklin, His Wife; Aloys
and Terisa Bent, His Wife,

vs.

LUCIEN B. MAXWELL, FREDERICK MILLER,
Jesus G. Abreu, Executors of the Estate
of Charles Beaubien, Deceased; Luz
Beaubien and Lucien B. Maxwell, Her
Husband; Leonor Beaubien, Teodora
Beaubien and Frederick Miller, Her
Husband; Petra Beaubien and Jesus G.
Abrieu, Her Husband; Juana Beaubien
and Joseph Clothier, Her Husband, and
Pablo Beaubien, by Frederick Miller, His
Guardian.

No. 1. In Chancery.

233 In the District Court for the County of Taos, in Chancery
Sitting.

Whereas an interlocutory decree was rendered at a former term of this court in the above cause, decreeing one-fourth of the land mentioned in the petition herein to the complainants in this cause, and appointing commissioners to divide and set apart the portion so decreed, and whereas said interlocutory decree was never carried into effect, and whereas since the time of the rendition of said decree a mutual agreement has been made between the parties to this cause, settling and determining all the equities in the same:

It is therefore hereby ordered, adjudged and decreed by the mutual consent and agreement of the said complainants as well as of the said defendants in this cause, that the interlocutory decree above mentioned, together with all orders made under and by virtue of the same be set aside; and by the mutual consent and agreement

of the said parties, it is hereby further ordered, adjudged and decreed that the said Lucien B. Maxwell, one of the defendants in this cause, pay to the said complainants the sum of eighteen thousand dollars, to be divided among them *per stirpes*, that is to the said Aloys Scheurick and Teresina Bent, his wife, one-third part, and to Alexander Hicklin and Estefana Bent, his wife, another third part, and to Charles Bent, Julian Bent and Alberto Silas Bent, the children and heirs of Alfred Bent, deceased, the remaining third part, to be equally divided among the said last named and to be paid into the hands of Guadalupe Bent, widow of the — Alfred Bent, deceased, and guardian *ad litem* for said children for the purposes of the said division.

And upon the further consent and agreement of the said parties, it is hereby further ordered, adjudged and decreed, that the said Alexander Hicklin and Estefana Bent, his wife, the said Aloys

234 Scheurick, and Teresina Bent, his wife, and the said Guadalupe Bent, guardian, *ad litem*, for Charles Bent, Julian Bent and Alberto Silas Bent, children and minor heirs of the said Alfred Bent, deceased, within ten days from the day of the date of this decree, make, execute and deliver to the said Lucien B. Maxwell good and sufficient deeds of conveyance of all their right, title, interest, estate, claim and demand of, in and to the lands in controversy in this cause; the said Guadalupe Bent, guardian *ad litem* as aforesaid, in the name of Charles Bent, Julian Bent and Alberto Silas Bent, minor heirs as aforesaid, and the said Alexander Hicklin and Estefana Bent, his wife, and the said Aloys Scheurick and Teresina Bent, his wife, in their own names. And by further consent and agreement between the said parties, it is hereby further ordered, adjudged and decreed, that the costs of this suit shall be paid, each of the said parties to pay the separate costs in the same made by themselves.

235 The said decree was not made by the personal procurement, knowledge, or consent of said Scheurich or Guadalupe Bent, and the fact of the entry thereof was unknown to them for several years thereafter.

No other pleadings, orders, or proceedings in said cause, other than those above mentioned or recited, appear in the record thereof, and the record thereof does not show whether or not any inquiry was made by the court or by its authority touching the value of the said premises, or of the interest of the now plaintiffs therein, or as to the necessity of disposing of the same, or touching the other estate or means of the said infants, or the ability of the mother of said infants to maintain and educate the said infants, or touching the propriety, necessity, or advisability of such sale and conveyance of the interest of the now plaintiffs, nor does there appear of record any motion, petition, or showing against the propriety of the original decree vacated by the said decree of September, 1866.

The grant in question contains about one million seven hundred thousand acres, about two hundred thousand acres of which lie in the State of Colorado, and the balance in New Mexico, and contains some of the best and most valuable lands in the Territory; it con-

236 tains large areas of grazing and tillable land, and is traversed by several streams, furnishing water for irrigation, a small part of which was cultivated in May, 1866, and it contains, in addition, large bodies of timber, and in May, 1866, was known to contain considerable coal deposits, and was then believed and has since proven to have considerable deposits of precious metals, including gold and silver. At and about the year 1866 and for several years thereafter there was no demand for or sales of undivided interests in lands of the quantity, character, and location of those in question, such as to create any ascertainable market value thereof. Statements of the value of said land, in the opinion of the witnesses examined in the present suit, based upon a valuation per acre, are given in the testimony, varying from two and one-half cents to one dollar and twenty-five cents, and it is impossible from these statements to satisfactorily ascertain or fix what was the value per acre of said grant in or about 1866. It cannot be said from the testimony that there was a market for such grants at the time in the sense of a demand for them, their value being largely speculative for the future.

It is proven on the part of the complainants that the said Guadalupe Bent is a Mexican woman, and at the time of her said appointment as guardian *ad litem* to the infant complainants and at the time of the execution of her deed of May 3rd, 1866, was ignorant of the English language, unable to read, write, or speak the same; was unfamiliar with business or with her duties as guardian *ad litem*; was without knowledge of the boundaries or extent of said lands, or the character or value thereof, or of the act of Congress confirming the said grant, or of the particulars of the decree of June 3rd, 1865; that Maxwell represented to Sheurich that the grant was not as large as it was supposed to be; that it did not extend into Colorado or beyond the Red river, whereas it did so extend over 200,000 acres; that said Scheurich and Guadalupe Bent believed and were influenced by said representations; that the said Maxwell, while generous and magnanimous in many respects, was unscrupulous and tyrannical as well, and was a resolute and determined man, and was at that time a man of large wealth and great power and influence throughout the county of Taos and Territory of New Mexico, as was known to said Guadalupe Bent, and he exercised such power and influence in such way that the weak feared to oppose him in matters of personal concern; that said Guadalupe Bent was in part influenced in executing said conveyance by this known character of Maxwell; that Maxwell made threats that unless the Bent heirs accepted the sum of \$18,000 for their claims they would never get anything, and that no one should occupy any part of his land, and that such threats were communicated to said Guadalupe, and that this and Maxwell's known character influenced her in making the conveyance to Maxwell; that the said conveyance was written in the English language and was not read over to said Guadalupe or interpreted to her, but it appears to be the fact that means of knowledge of the extent, character, and value of the said grant was open to the Bent heirs

and to their counsel. It was not definitely known at the time where the boundary line between Colorado and New Mexico was. Guadalupe Bent acted in concert with the adult complainants in the suit, dealing with their own interests on the same terms as those she represented, and she was willing to make the same settlement they did. Both Scheurich and the counsel for the Bent heirs were conversant with both the English and Spanish language- and could read and write the same.

It appears by Guadalupe Bent's own testimony, and the court accordingly finds, that when she executed the conveyance to Maxwell she understood there had been a settlement with Maxwell by which the interests of the Bent heirs were to be transferred to Maxwell for the sum of \$18,000; that she understood the document she signed was a transfer of the interest in the Maxwell grant, which had belonged to her husband, Alfred Bent; that the settlement for \$18,000 was satisfactory to her; that she supposed the document she signed was one which Scheurich had arranged with Maxwell; that she had relied on said Schurich for advice, and was willing to accept and do whatever he thought best in the matter; that she believed she had authority to sign the deed and to convey the interest in said grant which her former husband, Alfred Bent, had claimed or owned, and it was her intention by the said deed to convey to Maxwell whatever interest in said grant had belonged to said Alfred Bent in his lifetime and was left by him at his decease, and the court finds that no fraud, imposition, or error has been shown to have entered into said transaction or to have brought about said compromise decree.

No money was received by Guadalupe Bent from Maxwell at the time of the execution of said conveyance. Maxwell, upon the execution of the deeds by her and the two sisters of Alfred Bent, gave to them his three promissory notes, payable in one year, amounting in all to \$18,000, divided into such sums as were desired by the said parties. Guadalupe Bent received one of these notes for something over \$5,000. As to the payment of this note the testimony is conflicting. Guadalupe Thompson testifies that it was paid to her second husband, George W. Thompson, because her husband told her so, to whom she was married about thirteen months after the death of her husband, and to whom she delivered said note with everything else she had when she married him and whom she authorized to collect said note. George W. Thompson and other witnesses testify that only a portion of said note was paid. The note is not produced, but its absence is accounted for by the statement of Thompson that he sent it to Maxwell at his request to have a credit endorsed and that he never got it back. It does not appear that Maxwell refused to return it. The weight of the evidence is found to be that at the beginning of the Maxwell Company suit a considerable sum, but how much cannot be ascertained, remained unpaid on the note. It also appears that Maxwell was at all times after the making of the note a man of ample financial responsibility. It does not appear that any part of the proceeds of said note was paid to the children of Alfred Bent or their mother,

but George W. Thompson supported, maintained, and educated them during their minority after his marriage to their mother with the funds of his wife and himself the same as his own children, keeping no separate account.

Upon the execution and delivery of the deeds by Guadalupe Bent, guardian *ad litem*, and the adult complainants, May 3rd, 1866, Aloys Scheurich and his wife assumed for complainants in said original suit payment of the fees of their counsel therein and paid the same, the amount thereof being included in the note of Maxwell

240 given to Scheurich's wife and the *pro rata* amount thereof being deducted from the other two notes given to Guadalupe

Bent and Mrs. Hicklin in equal proportions. There is no evidence that such counsel or other counsel were afterwards retained by Scheurich or other of said complainants, and the record of the said decree of September, 1866, does not disclose what attorney appeared or assumed to appear for the complainants in said cause and consented to the making of said order.

The inventory of the property left by Alfred Bent and filed March 6th, 1867, by Guadalupe Bent, as administratrix, in the probate court shows that outside of the real estate and the note received from Maxwell the total assets of the estate were \$1,408. The debts mentioned in the will of Alfred Bent, together with additional claims against the estate admitted and allowed in the probate court, amounted to \$2,423. But witnesses familiar with said Bent's affairs testify that at the time of his death he had both real and personal property other than that inventoried, both in New Mexico and in Colorado.

And the court makes and certifies the foregoing statement and findings as the facts proven and established by the evidence in each of said causes, and orders that the same be incorporated in the record as part thereof.

THOMAS SMITH,

Chief Justice.

Filed October 15th, 1895. Geo. L. Wyllys, clerk. (Findings of fact.)

240½ And afterwards, to wit, on the 23rd day of November, 1895, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an affidavit of value in said cause; which said affidavit was and is in the words and figures following, to wit:

240½ In the Supreme Court of New Mexico.

THE MAXWELL LAND GRANT & RAILWAY COMPANY }

vs.

GUADALUPE THOMPSON *et al.* }

I, Sol H. Jaffa, being first duly sworn, says on oath: I reside at Trinidad, in the county of Las Animas, in the State of Colorado. I am engaged in the business of merchandising. Trinidad is not

more than ten miles from the northern limit of what is known as the Maxwell land grant, situate partly in Colfax county and partly in Las Animas county, Colorado. I have resided in the same vicinity—some of the time in Colorado and some of the time in New Mexico—for more than twenty years last past. I know the Maxwell land grant before mentioned, the same an interest in which is claimed by the plaintiffs and appellants in this above-entitled cause, and have been acquainted with it for more than twenty years last past. I have been over a good part of the area of the ground, and I believe I am pretty well acquainted with what it contains. A large — of it is grazing land. It contains a great many thousand acres of very valuable timber. Gold mines have been discovered and have yielded large sums and are still being worked. Extensive mines of coal have been opened and are still being worked, and upon the immediate vicinity of the water-courses there is quite a considerable area of irrigable and tillable land. The whole ground is understood to contain, and I should think does contain, not far from two million acres of land. I think I know the boundaries of this grant, and I think this estimate as to the contents of it is not too great. I believe I am acquainted with the value of lands in Colfax county, New Mexico, and Las Animas county, Colorado, according to the current going market prices thereof, and I am confident that an undivided one-twelfth part of this grant is worth not less than three hundred & seventy-five thousand dollars. I am not a party to this litigation nor in any way interested therein.

SOL H. JAFFA.

240³ Subscribed and sworn to before the undersigned, a notary public in and for the county of Las Animas, at the said county of Las Animas, in the State of Colorado, this 18th day of November, A. D. 1895.

WILLIAM LITTLEFIELD,

[SEAL.]

Notary Public.

My commission expires May 19th, 1896.

241 And afterwards, to wit, on the 12th day of November, 1895, there was filed in the office of the clerk of said supreme court of the Territory of New Mexico an affidavit of the value of the property involved in said suit; which said affidavit is in the words and figures following, to wit:

In the Supreme Court of New Mexico.

THE MAXWELL LAND GRANT & RAILWAY COMPANY }

vs.

GUADALUPE THOMPSON *et als.* }

Albert W. Archibald, being first duly sworn, says on oath: I reside at Trinidad, in the county of Las Animas, in the State of Colorado, and have resided there and in that part of Colorado since about the year 1861. During a considerable part of that time I

have followed the business of land surveying. I believe I am well acquainted with what is known as the Maxwell land grant, lying partly in Las Animas county, Colorado, and partly in the county of Colfax, in the Territory of New Mexico, and have been acquainted with that tract since about the year 1858. I have frequently visited the grant and have traveled over a very considerable part of its area. I think I am acquainted with the character of the surface, its products and capabilities. A very large part of the ground is good grazing ground and has probably no other value. A considerable part of it—the most part of it along the streams—is cultivated and is valuable for cultivation. I cannot say with confidence the area of irrigable land within the grant, but I think it certainly is not less than fifty thousand acres. A very large part of the grant is covered with forests of pine and spruce timber, valuable for the manufacture of lumber, railway ties, and other like purposes. Near Elizabethtown valuable mines of gold and silver were discovered as long ago as 1867 and were worked for several years, yielding large values in gold and silver; they have not been extensively worked of late years, but it is not believed that they have been exhausted. Very extensive mines of coal are found upon the grant, and these coal mines have been worked for more than ten years last past, yielding large quantities of coal. I believe I know the boundaries of the grant and am sufficiently acquainted with it to fix its value. I am satisfied that an undivided twelfth part of this grant is at this time worth not less than three hundred and fifty thousand
 242 dollars. In the present times there is no active market for real property, and it is difficult to estimate the value of so extensive a tract as this, because purchasers of so extensive a tract are not often found, but I make this estimate as to what I think the ground ought to bring if a purchaser could be found willing to pay a reasonable price.

ALBERT W. ARCHIBALD.

Subscribed and sworn to before the undersigned, a notary public in and for the county of Las Animas, at the said county of Las Animas, in the State of Colorado, this ninth (9th) day of November, A. D. 1895.

E. BRIGHAM,
Notary Public.

[SEAL.]

My commission expires Aug. 28, 1898.

And be it further remembered that on the ninth day of October, 1895, there was filed in the office of the clerk of the supreme court of New Mexico the opinion of said court in said cause; which said opinion is hereto annexed in accordance with rule 8 of the Supreme Court of the United States, and is in the words and figures following, to wit:

243 In the Supreme Court, Territory of New Mexico.

THE MAXWELL LAND GRANT AND RAIL-
WAY COMPANY *et als.*

v.

GUADALUPE THOMPSON, Administratrix,
et als., Appellants.

} Error to Colfax County.

Opinion of the Court.

COLLIER, A. J.:

The history of events which preceded the filing of the bill in this case are minutely set forth in the opinion of Justice Bradley, in the case of Thompson v. Maxwell, reported in 95 U. S., 391, and the purpose of the filing of the bill upon which proceedings were had that were then before the Supreme Court of the United States on appeal. The bill then before that court, being a bill of review, was held not to be sustainable, as such a bill could not be used to reverse, modify, and reconstruct the decree of September, 1866. That court held, however, that "if instead of seeking to reverse the decree of September, 1866, the bill had sought to carry that decree more effectually into execution, it would have been free from legal objections and equally conducive to the object in view, the quieting of the title to the land in question." That court therefore reversed the decree on that bill, which had been in favor of the complainants in the lower courts, with directions to allow them to amend their bill as they should be advised and with liberty to the defendants to answer any new matter introduced therein, and that all the proofs in the case shall stand as proofs upon any future hearing, with liberty to either party to take additional proofs, &c. An amended bill was then filed, which by elimination

244 changed it from a bill of review to a bill to quiet in complainants the title to the property in controversy.

Upon the answer practically the same questions are raised as in the case of Charles Bent *et als.*, by their guardian *ad litem*, George Thompson, vs. The Maxwell L. G. & R'y Co., decided at this term, the evidence in each case being used in both, as per stipulation of counsel, who were the same in both causes.

A decision against the appellants, who were complainants in that cause, must logically conduce to an affirmance of the decree rendered in favor of the complainants in this cause; and it is so ordered. It is further ordered that this cause be remanded to the district court of Colfax county, with directions to carry said decree into effect.

N. C. COLLIER,
Associate Justice.

We concur:

N. B. LAUGHLIN,
Associate Justice.

H. B. HAMILTON,
Associate Justice.

GIDEON D. BANTZ,
Associate Justice.

245 TERRITORY OF NEW MEXICO, }
County of Santa Fé, Supreme Court. }

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a full, true, and perfect transcript of such portions of the record in said cause as said appellants deem necessary for review in the Supreme Court of the United States, as the same remain on file and of record in my office.

Witness my hand and the seal of said court, at Santa Fé, New Mexico, this 15th day of November, A. D. 1895.

[Seal Supreme Court, Territory of New Mexico.]

GEO. L. WYLLYS, *Clerk.*

246 In the Supreme Court of the Territory of New Mexico.

THE MAXWELL LAND GRANT & RAILWAY COMPANY *et als.*, Appellees, }
vs.
GAUDALUPE THOMPSON, Administratrix, &c., *et als.*, Appellants. }

Appeal from Colfax district court.

Be it further remembered that on the 9th day of November, A. D. 1895, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a certain bond in appeal herein, then and there duly approved by the Honorable N. B. Laughlin, one of the judges of the said supreme court, and which said bond, with the approval aforesaid thereunder written, was and is in words and figures as follows, to wit:

"Know all men by these presents that we, Guadalupe Thompson, as administratrix of the estate of Alfred Bent, deceased; George Thompson, husband of the said Guadalupe Thompson; Charles Bent, Julian Bent, and Alberto Silas Bent, as principals, and C. F. Remsberg and E. D. Wight, as sureties, are held and firmly bound unto the Maxwell Land Grant & Railway Company and Luz B. Maxwell in the full and just sum of five hundred dollars (\$500), to be paid to them, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this ninth day of November, 1895.

246½ Whereas lately, at the July term, 1895, of the supreme court of the Territory of New Mexico, in a certain appeal then pending in said court between the said Guadalupe Thompson, administratrix as aforesaid; George Thompson, Charles Bent, Alberto Silas Bent, and Julian Bent, as appellants, and said Maxwell Land Grant & Railway Company and Luz B. Maxwell, as appellees, a certain final decree was rendered against the said appellants, and they, the said appellants, have prayed an appeal from the said decree to the Supreme Court of the United States:

Now, the condition of this obligation is such that if the said Guadalupe Thompson, administratrix as aforesaid; George W. Thompson, Charles Bent, Alberto Silas Bent, and Julian Bent shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then the above obligation to be void; else in full force and virtue.

GEORGE THOMPSON.	[SEAL.]
GUADALUPE THOMPSON,	[SEAL.]
<i>Administratrix.</i>	
CHARLES BENT.	[SEAL.]
JULIANO BENT.	[SEAL.]
ALBERTO SILAS BENT.	[SEAL.]
C. F. REMSBERG.	[SEAL.]
E. D. WIGHT.	[SEAL.]

Signed, sealed, & delivered in presence of—

Witness as to signatures of Guadalupe Thompson, administratrix; Charles Bent, Julian Bent, and Alberto Silas Bent:
GEORGE W. THOMPSON.

Witness as to signatures of George Thompson, C. F. Remsberg, and E. D. Wight:
M. R. FORBES.

Approved:
N. B. LAUGHLIN,
Judge Supreme Court, New Mexico.

Approved:
[SEAL.] GEO. L. WYLLYS,
Clerk Supreme Court, Territory of N. Mex.

247 Be it further remembered that afterwards, to wit, on the 30th day of November, A. D. 1895, there *was* filed in the said supreme court certain assignments of error herein in the appeal of the said appellants to the Supreme Court of the United States, and the original of which said assignments of error *are* hereto attached:

248 TERRITORY OF NEW MEXICO:

In the Supreme Court.

I, George L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a true, perfect, and correct transcript of the portions of the record of the cause therein mentioned which are therein set forth, to wit, the appeal bond, and that the paper hereunto attached is the original of the assignments of error in the appeal of the appellants in said cause to the Supreme Court of the United States, which were also filed in my office.

In witness whereof I have set my hand and seal of said court this 30th day of December, A. D. 1895.

[Seal Supreme Court, Territory of New Mexico.]

GEO. L. WYLLYS, *Clerk.*

249 *Appeal from the Supreme Court of the Territory of New Mexico.*

In the Supreme Court of the United States.

GUADALUPE THOMPSON, Administratrix of the Estate of Alfred Bent, Deceased; George Thompson, Her Husband; Charles Bent, Alberto Silas Bent, Julian Bent, Defendants and Appellants,

vs.

THE MAXWELL LAND GRANT & RAILWAY COMPANY, LUZ B. MAXWELL, Plaintiffs and Appellees.

And the said Guadalupe Thompson, administratrix; George Thompson, Charles Bent, Alberto Silas Bent, and Julian Bent, come now and say that in the record and proceedings of the supreme court of New Mexico and in the final decree of said supreme court manifest error hath intervened in this, to wit:

First. It appears by the record and proceedings aforesaid that the decree of the district court in and for the said county of Colfax was by the supreme court of the said Territory of New Mexico in all things affirmed, whereas the said decree given in the said district court in and for the said county of Colfax was erroneous and ought to have been reversed.

Second. Also in this, to wit, that the facts found and declared by the supreme court of the Territory of New Mexico are not sufficient to sustain the decree given in the supreme court of the Territory of

250 New Mexico nor the decree given in the district court of the county of Colfax aforesaid, but, on the contrary thereof, upon the facts found by the supreme court of the Territory of New Mexico, the decree given in the district court in and for the county of Colfax, in said Territory, in favor of the said appellees and against these appellants ought to have been reversed and declared for naught.

Third. That in and by the said record and proceedings it doth appear that by a certain final decree made and given in the district court in and for the county of Taos, in the Territory of New Mexico, on the 3rd day of June, 1865, Alfred Bent, ancestor of the now defendants, and appellants Charles Bent, Alberto Silas Bent, Julian Bent, was vested with one undivided twelfth part and share in the premises named in the bill of complaint of the said appellees, plaintiffs in the district court of the said county of Colfax, and the decree afterwards, at the September term, 1866, given in the said district court in and for the county of Taos, assuming to vacate, annul, and set aside the final decree so given on the 3rd day of June, 1865, was and is erroneous and void as against appellants, and decree ought to have been given in the district court in and for the said county

of Colfax dismissing the bill of complaint of the said appellees out of the said district court, whereas in and by the said record and proceedings it doth appear that final decree was given in the district court in and for the said county of Colfax in accordance with the prayer in the complaint of the appellees, plaintiffs in the district court of the said county of Colfax, and by the decree given in the said supreme court of the Territory of New Mexico the final decree so given in the said district court in and for the county of

251 Taos on the 3rd day of June, 1865, was declared to be interlocutory, and in and by the judgment, decree, and opinion of the supreme court of the Territory of New Mexico it was declared that the decree entered at the September term, 1866, of the district court in and for the said county of Taos, assuming to vacate, annul, and set aside the said former decree of that court on mere consent of parties, not showing or setting forth who assumed to represent or consent for the defendants and appellants herein in that behalf, and no evidence being heard touching the matter, was and is nevertheless effectual to vacate, annul, and set aside such former decree in favor of plaintiffs' ancestor, the said Alfred Bent.

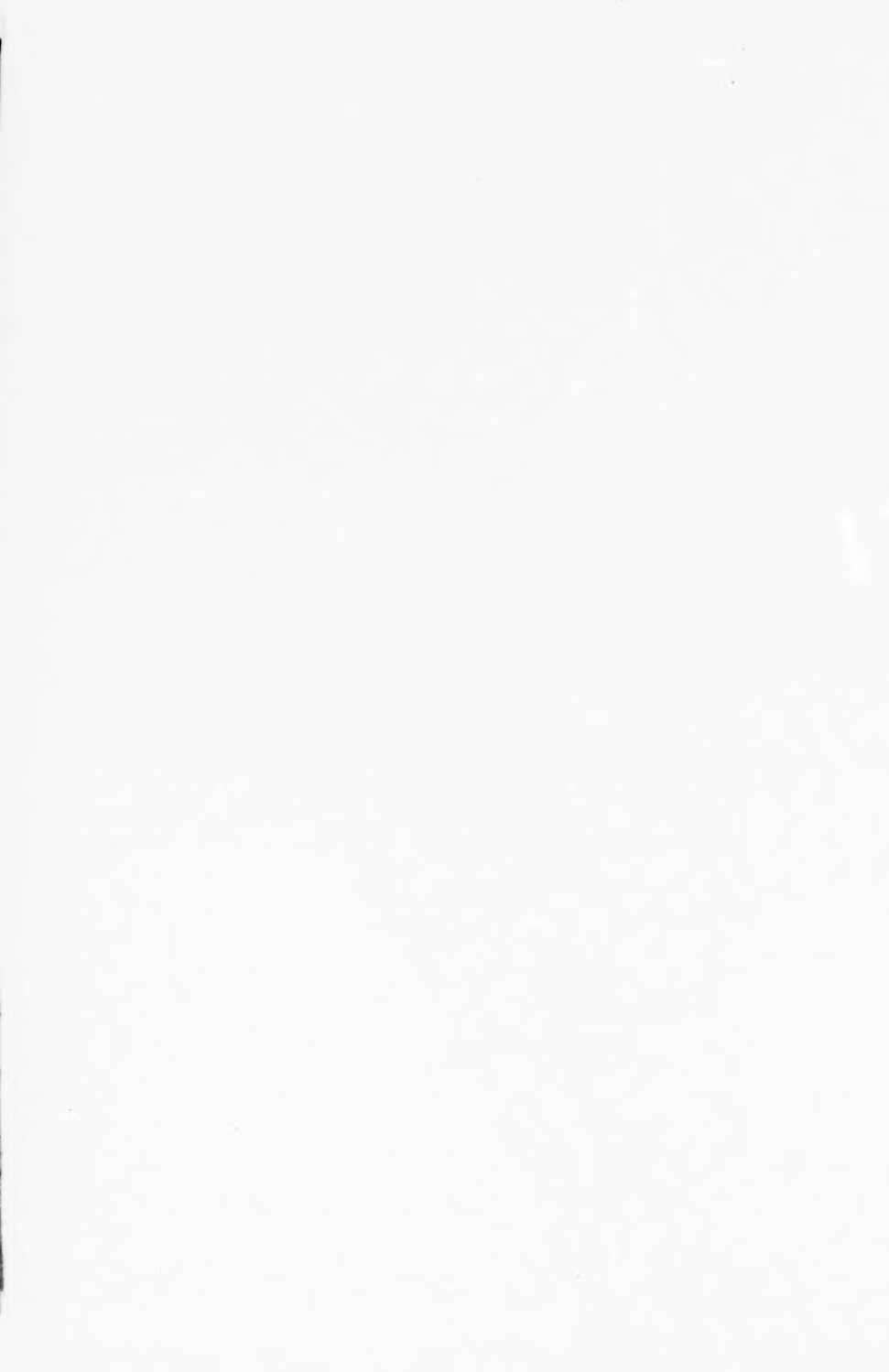
252 Wherefore, for the errors aforesaid and the manifold other error in the said record and proceedings and in the decree of the said supreme court of the Territory of New Mexico appearing, the said Guadalupe Thompson, administratrix of the estate of Alfred Bent, deceased; George Thompson, her husband; Charles Bent, Alberto Silas Bent, and Julian Bent pray that the decree of the supreme court of the Territory of New Mexico and the decree given herein in the district court in and for the county of Colfax may be reversed, annulled, and altogether held for naught, and that appellants be restored to all things which by virtue thereof they have lost, and they also pray that decree be given for their costs in this behalf expended.

CALDWELL YEAMAN,
E. T. WELLS,
R. T. McNEAL,
JOHN G. TAYLOR,

Solicitors for Appellants and of Counsel.

[Endorsed:] Filed in my office this Nov. 30, 1895. Geo. L. Wylls, clerk.

Endorsed on cover: Case No. 16,109. New Mexico Territory supreme court. Term No., 387. Guadalupe Thompson, administratrix of the estate of Alfred Bent, deceased; George Thompson, her husband; Charles Bent, Alberto Silas Bent, & Julian Bent, appellants, vs. The Maxwell Land Grant & Railway Company & Luz B. Maxwell. Filed December 9, 1895.



TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 322

91.

CHARLES BENT, JULIAN BENT, AND ALBERTO SILAS
BENT, APPELLANTS,

vs.

GUADALUPE MIRANDA, JESUS G. ABREU, AS SURVIV-
ING EXECUTOR OF THE LAST WILL OF CHARLES
BEAUBIEN; LUZ B. MAXWELL, ET AL.

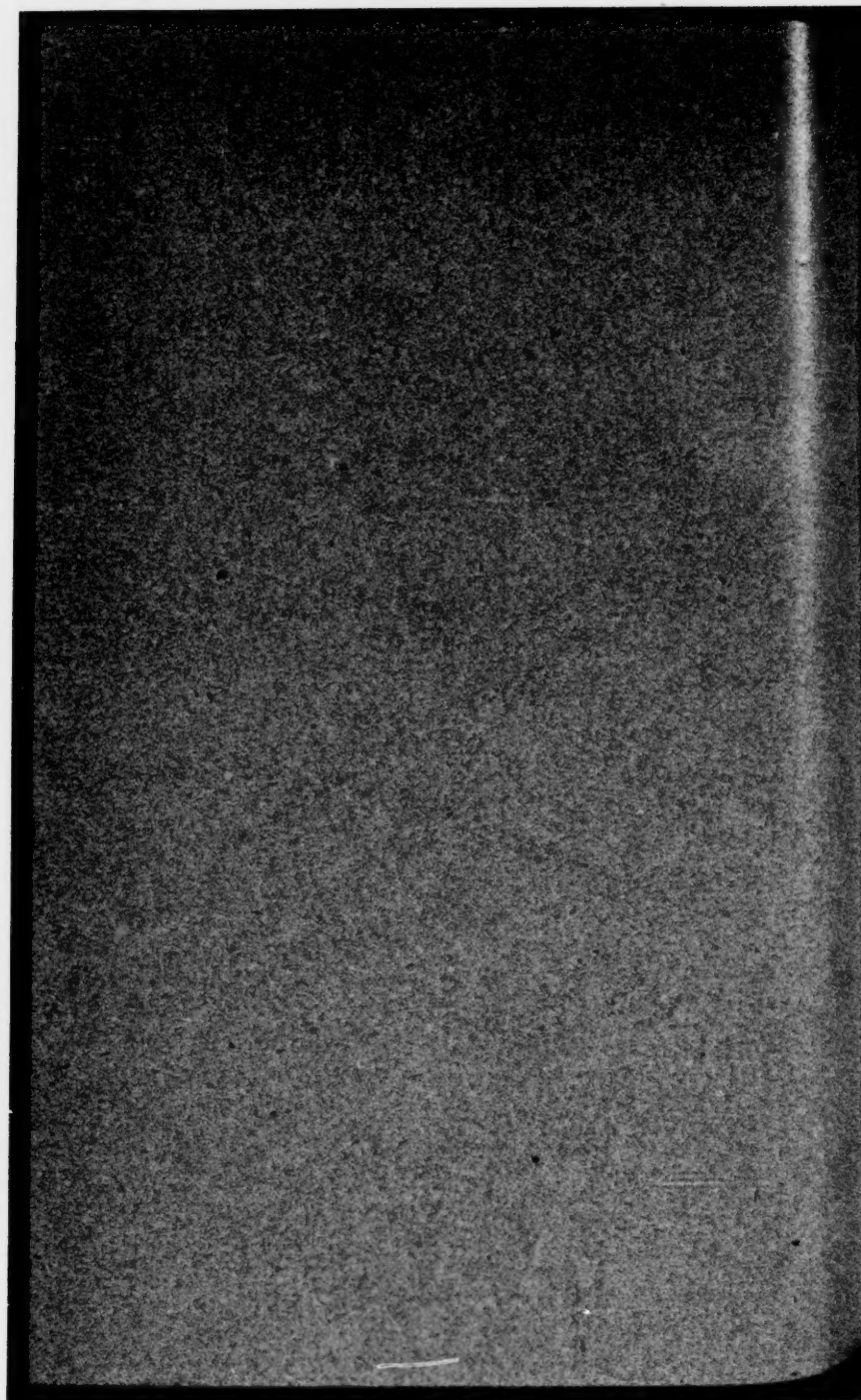
APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW
MEXICO.

FILED DECEMBER 9, 1898.

(16,110.)

470
15

58



(16,110.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1896.

No. 388.

CHARLES BENT, JULIAN BENT, AND ALBERTO SILAS
BENT, APPELLANTS,

vs.

GUADALUPE MIRANDA; JESUS G. ABREU, AS SURVIV-
ING EXECUTOR OF THE LAST WILL OF CHARLES
BEAUBIEN; LUZ B. MAXWELL, ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW
MEXICO.

INDEX.

	Original.	Print.
Caption.....	1	1
Transcript of record from district court of Colfax county.....	2	1
Caption.....	2	1
Bill of complaint.....	2	1
Exhibit A—Bill of complaint in case of Bent <i>et al. vs.</i> Mi- randa <i>et al.</i>	25	16
Demurrer to bill.....	32	20
Decree.....	35	22
Mandate from supreme court of New Mexico.....	35	22
Decree on mandate.....	38	23
Answer of The Maxwell Land Grant Co.....	39	24
Answer of The Maxwell Land Grant and Railway Co. <i>et al.</i>	59	37
Replication.....	63	40
Decree <i>pro confesso</i>	66	41

	Original.	Print.
Stipulation as to evidence, &c.....	67	41
Decree, May 8, 1893.....	69	42
Order allowing appeal.....	71	43
Assignment of error.....	72	43
Decree	73	44
Order allowing appeal, &c.....	73½	45
Findings of fact.....	74	45
Bill of complaint in case of Bent <i>et al. vs. Miranda et al.</i>	75	46
Amended bill in case of Bent <i>et al. vs. Miranda et al.</i>	81	49
Answer of Miranda in case of Bent <i>et al. vs. Miranda et al.</i>	86	52
Answer of Beaubien in case of Bent <i>et al. vs. Miranda et al.</i>	89	53
Answer of Maxwell in case of Bent <i>et al. vs. Miranda et al.</i>	94	56
Answer of Pley in case of Bent <i>et al. vs. Miranda et al.</i>	96	57
Interlocutory decree in case of Bent <i>et al. vs. Miranda et al.</i>	98	58
Petition of Guadalupe Bent for appointment as administratrix, &c.....	107	63
Probate of will of Alfred Bent.	110	64
Will of Alfred Bent.....	111	65
Inventory of estate of Alfred Bent.....	112	65
Allowance of account against estate of Alfred Bent.....	114	66
Order making new parties in case of Bent <i>et al. vs. Heirs of</i> Baubien <i>et al.</i>	118	69
Order appointing guardian <i>ad litem</i> in case of Bent <i>et al. vs. Heirs</i> of Baubien <i>et al.</i>	119	69
Deed from Guadalupe Bent to Lucien B. Maxwell, May 3, 1866.	121	70
Decree of September 13, 1866, in case of Bent <i>et al. vs. Maxwell</i> <i>et al.</i>	125	73
Judge's certificate to statement of facts.....	133	77
Affidavit of Sol H. Jaffa as to value	133½	77
Affidavit of Albert W. Archibald as to value.....	134	78
Opinion.....	136	80
Clerk's certificate.....	145	86
Bond.....	146	87
Clerk's certificate.....	149	88
Assignment of errors.....	150	89

1 Be it remembered that heretofore, to wit, on the nineteenth day of July, 1894, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a certain transcript of record from the district court in and for the county of Colfax, in said Territory; which said transcript is in the words and figures following, to wit:

2 *Transcript of Record.*

Pleas before the Honorable L. Bradford Prince, chief justice of the supreme court of the Territory of New Mexico, and judge of the fourth judicial district court, at a term of said district court begun and held at chambers in and for the county of Colfax, on the 7th day of April, A. D. 1882, to wit:

CHARLES BENT <i>et al.</i>	}	Chancery. No. 430.
<i>vs.</i>		
THE MAXWELL LAND GRANT AND RAILWAY Co. <i>et al.</i>		

Be it remembered, that heretofore, to wit: on the 7th day of April, A. D. 1882, the said complainants filed in the clerk's office of the fourth judicial district for the Territory of New Mexico their bill of complaint, which said bill of complaint is in the words and figures as follows, to wit:

Bill of Complaint.

TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court of the First Judicial District, Sitting in the County of Colfax, in the Territory of New Mexico, for the Trial of Causes Arising under the Laws of the Territory, at the — Term Thereof, A. D. 1882.

To the Honorable L. Bradford Prince, chief justice of the supreme court of said Territory and judge of the first judicial district thereof, in chancery sitting:

Filed in my office this 7th day of April, 1882.

[SEAL.]

F. W. CLANCY,
Clerk and Register,
By H. S. CLANCY, Deputy.

\$5.00 paid by Geo. W. Thompson.

3 Humbly complaining, show unto your honor, your orators, Charles Bent, of lawful age, Juliano Bent, Alberto Silas Bent, infants under the age of twenty-one years, all of the county of Las Animas, and State of Colorado, by George W. Thompson, their next friend, that heretofore, and on or about the 11th day of January, 1—388

A. D. 1841, the Republic of Mexico, in due form of law, granted to Charles Beaubien and Guadalupe Miranda, citizens of the said republic, a tract of land, situate in the then province or department of New Mexico, and described in the said grant as follows, to wit: Commencing on the east of Red river, a mound was erected, from whence, following in a direct line in an easterly direction to the first hills, another mound was erected at the point thereof, and continuing from south to north on a line nearly parallel with Red river, a third mound was erected on the north side of the Chicorica, or Chacuaco mesa (table-land) thence turning towards the west, and following along the side of the said table-land of the Chacuaco to the summit of the mountain, where the fourth mound was erected; from thence, following along the summit of said main ridge from the north to the south to the Cuesta del Osha, one hundred varas north of the road from Fernandez to the Laguna Negra, where the fifth mound was erected; from thence, turning again to the east, towards Red river, and following along the southern side of the table-lands of the Rayado and those of the Gonzalitos, on the eastern point of which the sixth mound was erected; from thence, following in a northerly direction, to the west side of the Red river, opposite the first, where the last and seventh mound was erected;—all of which will more fully appear by reference to certain copies of the said grant and act of possession which your orators crave leave to file herewith, and make part hereof, and whereunto, for greater certainty, your orators crave leave to refer at the hearing. And your orators further show, that, afterwards, and on or about the 21st day

of June, A. D. 1860, by the act of Congress, entitled "An act
4 to confirm certain private land claims in the Territory of New Mexico," approved on the day and year last aforesaid, the said grant was confirmed.

Your orators further show that about the 12th day of September, A. D. 1859, Alfred Bent, Estefana Hicklin, Alexander Hicklin, her husband, and Teresina Bent, otherwise called Teresa T. Bent, instituted in the district court, in and for the county of Taos, in the Territory of New Mexico (in which said county the whole of said grant was then situate), their certain bill in equity, against the said Guadalupe Miranda and Charles Beaubien, and one Lucien B. Maxwell and one Joseph Pley, alleging that Charles Bent, father of said Alfred, Estefana and Teresina, was in his lifetime, by virtue of a certain parole agreement made between him, the said Charles Bent of the one part, and said Beaubien and Miranda of the other part, entitled in equity unto the equal, undivided one-third part of the said grant of lands; that said Charles Bent had departed this life intestate, and leaving said Alfred, Estefana and Teresina as his sole heirs-at-law; and in and by their said bill, the said Alfred, Estefana and Teresina prayed that they might be decreed entitled to said one-third part of said grant of land in fee-simple, and that partition thereof might be made; that pending said suit said Charles Beaubien departed this life, and Frederick Miller and Jesus G. Abreu, executors of his last will and testament, Luz B. Maxwell, wife of said Lucien B. Maxwell, Teodora Miller (otherwise called

Isadora Miller), wife of said Frederick Miller; Petra Abreu, wife of Jesus G. Abreu; Juana Clothier, wife of Joseph Clothier; Leonora Trujillo, wife of Vidal Trujillo, with their said respective husbands and Pablo Beaubien, then an infant, but who, about the year 1866, came of lawful age, and Frederick Miller, his guardian, were made parties defendant to said suit; that all said parties answered denying the equities claimed in said bill; that pending said suit said Teresina, also intermarried with Aloys Scheurick, and said Aloys was made party to said suit with said Teresina; that said
5 cause came by legal continuances to the term of said district court, begun and held on or about the 29th day of May, A. D. 1865, and thereupon at said term of the court and on or about the 3rd day of June, A. D. 1865, a certain decree was made and entered of record, whereby, among other things therein contained and set forth, it was ordered, adjudged and decreed that the said Alfred, Estefana and Teresina were, and were thereby declared to be the heirs-at-law of the said Charles Bent, deceased, and as such heirs, fully and absolutely entitled to, and seized of the undivided one-fourth part of the said grant of lands, which your orators show was then commonly called the Rayado grant, and otherwise known as the Beaubien and Miranda grant, and since that time hath been commonly known as the Maxwell grant or estate, and which your orators show was then situate partly in the then county of Mora, in said Territory of New Mexico, and partly within the limits of the then Territory of Colorado, and now situate partly within the limits of the county of Colfax in said Territory of New Mexico, and partly in the State of Colorado.

And in and by the said decree the said undivided one-fourth part of the said grant of lands, was declared established and confirmed to them, the said Alfred, Estefana and Teresina, and to their heirs and assigns forever, with the full and perfect right, powers and authority to possess and enjoy the same, and it was decreed that a just and equitable partition of the said grant should be made between the said Alfred, Estefana and Teresina, and the aforesaid daughters and son of said Charles Beaubien, deceased, defendants therein, and said Lucien B. Maxwell (to whom, as declared in the said decree, the said Guadalupe Miranda had assigned, conveyed and set over, all his right, estate, part and share of and in the said grant,) and that the commissioners therein appointed to make the said partition,
6 should lay off one-fourth of the said grant to the said Alfred, Estefana and Teresina, and one-half part of the remaining three-fourths to the said Lucien B. Maxwell, and one-half thereof to the said Leonora, Teodora, Luz, Juana, Petra and Pablo, sons and daughters of the said Charles Beaubien, and in and by the said decree Lucien Stewart, then of the said Taos county, Vicente Romero and William Kroenig, then of the said county of Mora, were appointed commissioners to make the said partition, and particular directions were in and by the said decree given in respect to the said partition; your orators crave leave at the hearing to refer to the original or some duly authenticated copy of the record of

said decree for greater certainty, and a copy thereof is hereto attached marked "A," and prayed to be taken as a part hereof.

Your orators further show on information and belief, that afterwards and about the year 1870, the said Leonora, Teodora, Juana, Petra and Pablo, all being then of full age, by their certain deeds of conveyance in due form of law granted, bargained, sold and conveyed to the said Lucien B. Maxwell all their estate, right, title and interest in or to the said premises, and about that same time, the said Guadalupe Miranda, in confirmation of the former assignment, transfer or conveyance of the said premises, in said decree recited, executed his certain deed of release, thereby conveying unto the said Lucien B. Maxwell all the right, title, property claim and demand, which he the said Guadalupe Miranda, had or might have in or to the said premises (to each of which said several conveyances, or to some authentic copy thereof, your orators, for greater certainty, crave leave to refer at the hearing), so that neither the said Leonora, Teodora, Juana, Petra, Pablo, Guadalupe nor either of them, have any estate, right, title or interest, in or to the said premises, nor any part thereof, nor any interest in this suit, or the subject-matter thereof, or the relief demanded.

Your orators further show that after the entry of the said decree of partition, and on or about the — day of December, 1865,
7 and before partition of the said premises had been effected, in pursuance of the said decree, the said Alfred Bent departed this life intestate, and leaving as his sole heirs-at-law your orators Julianio Bent and Alberto Silas Bent, then and still infants of tender years, and your orator, Charles Bent, then also an infant, but who since, to wit:—on or about the 26th day of April, A. D. 1881, hath come of lawful age. That on or about the 9th day of April, 1866, at a term of the district court, in and for the said county of Taos then sitting, the death of the said Alfred Bent was suggested of record, and your orators, as his children and heirs-at-law, were made parties complainants in that same cause, in his stead; and that afterwards, at that same term of the court, an order was made and entered of record in that same cause, wherein, after reciting an agreement of the parties thereunto, Guadalupe Bent was appointed guardian *ad litem* and commissioner in chancery for the minors of Alfred Bent, with full power to execute deeds, or carry into execution all sales or transfers made of her interests in and to the real estate therein described to Lucien B. Maxwell, one of the defendants in that cause, and said cause was continued to the next term of the said court.

That afterwards, at the September term, A. D. 1866, of the said district court, begun and held on or about the 10th day of September, 1866, at within and for the said county of Taos, a certain order or decree was made and entered of record in that same cause, wherein, after reciting the aforementioned decree, appointing commissioners to divide and set apart the one-fourth part of the said lands to the complainants in that said cause, and that said decree had never been carried into effect, and that, since the rendition thereof, a mutual agreement had been made between the parties to

that cause, settling and determining all equities in the same, it was ordered, adjudged and decreed, that the decree aforesaid, and all orders made under it, by virtue of the same, should be set aside;

and it was further ordered, adjudged and decreed, (by the mutual consent and agreement of the said parties, as appears by the recitation of the said decree,) that the said Lucien B.

Maxwell should pay to said complainants in that cause eighteen thousand dollars, as follows, to wit: To the said Aloys and Teresina, one-third part, and to the said Alexander and Estefana, another one-third part, and to your orators, the children and heirs of Alfred Bent, deceased, the remaining one-third part, to be equally divided among your orators, and to be paid into the hands of Guadalupe Bent, widow of the said Alfred Bent, and guardian *ad litem* of your orators, for the purposes of the said division.

And it was further ordered, adjudged and decreed, that the said Alexander, Estefana, Aloys and Teresina, and the said Guadalupe Bent, guardian *ad litem* to your orators, within ten days from that date should make, execute and deliver to the said Lucien B. Maxwell, good and sufficient deeds of conveyance of all their right, title, interest, estate, claim and demand, of, in and to the lands in controversy in that cause, the said Guadalupe Bent, in the names of your orators, and the others of said complainants in their own names; and that each of the said parties should pay the separate costs in that said suit, made by themselves.

All which orders and directions in the said last-mentioned decree, are thereby recited to have been made by the consent and agreement of the parties to the said suit.

And your orators further show that by the record of the said decree, it appears that although the said decree purports to be made by consent of parties, nevertheless it doth not appear by whom your orators were represented in that behalf, nor who assumed to consent to the said decree, in behalf of your orators. Also by the record of the said decree, it appears that no time whatever was limited to the said Maxwell for the payment of the said eighteen thousand dollars or any part thereof; and that no day was in the said decree allowed to your orators after coming to their majority to show cause against the said decree.

And your orators further show that said decrees and orders and each thereof have been duly enrolled in the said district court.

And your orators, for greater certainty, crave leave to refer at the hearing to the originals, or some duly authenticated copy of the record of each of the said orders and decrees.

Your orators further show on information and belief, that before the entry of the said last before-mentioned order and decree, and about the month of May, 1866, the said Aloys Sheurick and Teresina, his wife, and the said Alexander Hicklin and Estefana, his wife, by their deeds in due form of law, had conveyed to the said Lucien B. Maxwell all the interest of the said Estefana and Teresina, being the undivided two-twelfths in the said grant of lands, and that likewise before the entry of the said last-mentioned decree, and on or about the third day of May, 1866, the said Guadalupe

Bent had also executed her deed of conveyance, wherein after reciting that she had been appointed guardian *ad litem* and commissioner in chancery for your orators, minor heirs of the said Alfred Bent, deceased, by the order of the said district court, the said Guadalupe Bent by virtue of the power and authority in her conferred by the said decree, and in consideration of the sum of six thousand dollars, in her said conveyance recited, to have been paid to her by said Lucien B. Maxwell, assumed and pretended to grant, bargain and sell unto the said L. B. Maxwell the certain real estate known and described as the Rayado grant, theretofore granted to Charles Beaubien and Guadalupe Miranda by Governor Armijo on the 11th day of January, 1841, and bounded and described as follows, to wit: Beginning on the east bank of the Rio Colorado, at a mound of rocks, thence running in a straight line eastward to the first hills to another mound of rocks, thence continuing from south to north, on a parallel line with the

9 River Colorado, to the third mound of rocks, on the northern edge of the table-lands Chicorica or Chacuaco, thence running westward and following the edge of the table-lands of Chacuaco to the top or cone of the Sierra Madre to the fourth mound of rocks, thence from north to south, following the top of the said Sierra Madre to the Cuesta del Osha, one hundred varas to the north of the road to Fernandes and to Laguna Negra to the fifth mound of rocks, thence turning anew to the east toward the Rio Colorado, and following the southern edge of the table-lands of Rayado and Gonzalitos to the eastern point of these table-lands, to the sixth mound of rocks, and thence following in a northerly direction, until the said line strikes the Rio Colorado on the western bank of said river, where the seventh mound of rocks was placed; to have and to hold the undivided one-twelfth interest in and to the above-described real estate unto the said Lucien B. Maxwell and his heirs and assigns forever, the said one-twelfth undivided interest, estate, claim and demand, of the said Charles Bent, Julian Bent and Alberto Silas Bent, the said minor heirs of their father, the said Alfred Bent, deceased, of, in and to the real estate, as a child of, and one of the heirs of Charles Bent, senior, late of the Territory of New Mexico:—to which said several deeds and conveyances or to some duly authenticated copy or copies thereof, your orators, for greater certainty, crave leave to refer at the hearing.

And your orators further show to your honor that the said Guadalupe Bent, who your orators show is the mother of your orators, is a Mexican woman; and at the time of her said appointment as guardian *ad litem* to your orators, and at the time of the execution of her said pretended conveyance, and at the time of the entry of said last-recited decree was wholly ignorant of the English language, unable to read, write or speak the same, unfamiliar with business, or the proceedings of courts of law, unacquainted with the rights of your orators or her duties in that behalf, or the bounds or
 10 extent of the said grant, or the character or value thereof; and ignorant of the confirmation of the said grant by the act of Congress aforesaid; and ignorant of the decree of the said

district court directing partition of the said grant as hereinbefore set forth; or of what part or share in said grant was claimed by your orator's father in his lifetime.

And your orators show on information and belief, that in and about the management of her business, property and affairs, the said Guadalupe Bent was then and for a long time before that wont to consult with and rely upon the advice of the said Aloys Scheurick; that the said Scheurick was then residing near to the said Guadalupe Bent and was accustomed to profess great friendship and regard for her, and her children, and a desire to protect and assist her in the good management of the estate and property which had been left by the said Alfred Bent, and to protect the interests of her said minor children, and by reason of these professions of the said Aloys, and the connection in marriage which had subsisted between the said Aloys, and the father of your orators, the said Guadalupe Bent reposed special trust and confidence in the said Aloys Scheurick.

And your orators further show on information and belief that the said Lucien B. Maxwell was at that time and long before that a man of great wealth, and was possessed of great power and influence, throughout the said county of Taos and the said Territory of New Mexico, all which was at all the times aforesaid well known to said Guadalupe Bent and the said Lucien B. Maxwell, well knowing the weakness and ignorance of the said Guadalupe Bent, and her inexperience in matters of business and proceedings in courts, and her want of information as to the extent, character and value of the said grant, and her ignorance of the act of Congress aforesaid confirming said grant, caused and procured said Guadalupe Bent to be appointed

11 guardian *ad litem* for your orators; and procured the said pretended conveyance to be prepared for execution by the said Guadalupe Bent, and caused the same to be written in the English language, and caused and procured the said Aloys Scheurick to believe and to represent and said Scheurick by procurement of the said Maxwell or otherwise, did represent to the said Guadalupe Bent that the said grant of lands was for the most part, fit only for grazing, that the same contained little or no mineral, of value, and that the same extended only to the north line of the said Territory of New Mexico, as then constituted, that he, the said Maxwell was the owner of the major part of said grant, or was buying, or about to purchase the shares and interests of all other owners therein, and might, and would control the whole of said grant and exclude your orators from all share or part thereof; that the said Maxwell would pay to her, the said Guadalupe Bent, the sum of six thousand dollars for the interests of your orators in said grant, and that she, the said Guadalupe Bent, was duly authorized to sell and convey the said interests of your orators; and that unless she should accept the said sum of six thousand dollars, neither she nor your orators would ever realize anything for the interest of your orators in said grant.

And your orators further show, on information and belief, that confiding in the representations of the said Scheurick, so by pro-

curement of the said Maxwell or otherwise made to her, not knowing the contrary thereof, and moved and induced by the said representations, and by the great wealth, power and influence of said Lucien B. Maxwell, the said Guadalupe Bent executed the said pretended conveyance of your orators' interest in the said premises.

And your orators further show on information and belief, that neither at the time of the execution of the said conveyance, nor at any time before that, was the said pretenden — read, or interpreted, or explained to her, that said pretended conveyance was executed without the advice of counsel, and at the time of the execution thereof, the said Guadalupe Bent was in entire ignorance of the character or extent of the said grant, or the value thereof, or of the rights and shares of your orators therein, and was believing and confiding in all and singular the representations aforesaid.

And your orators further show on information and belief, that neither then, nor at any time afterwards, nor after the entry of the decree lastly hereinbefore set forth at the September term, A. D. 1866, of the said district court; did the said Lucien B. Maxwell pay to the said Guadalupe Bent, nor to your orators, nor to any one for them, the said sum of six thousand dollars, though your orators have heard and believe that the said Lucien B. Maxwell, at some time after the entry of the last-mentioned decree, (and as your orators show, on information and belief, about the year eighteen hundred and sixty-eight,) paid or delivered to one George W. Thompson (with whom the said Guadalupe Bent had in the meantime, and about the year 1867, intermarried) some small sums of money, and sundry articles of personal property, much less in value than the said sum of six thousand dollars; all of which was by the said George W. converted to his own uses, and no part thereof was invested for or applied to the uses of your orators.

And your orators further show, on information and belief, that neither at the time of the entry of the said last-recited decree, at the September term, 1866, of the said district court, nor at any time before that, did the said Guadalupe Bent, nor the counsel or solicitor of the said Guadalupe Bent, nor any other person authorized to agree or consent for your orators in that behalf, in fact, agree or consent as in the said last-mentioned decree is falsely recited, or agree or consent to the entry of the said last-mentioned decree, nor to the vacation or setting aside of the former decree first hereinabove recited; and on information and belief your orators further aver that the said order and decree at the said September term, 1866, of the said district court, was procured to be entered in the absence of the said Guadalupe Bent, and without notice to her of any intention to apply therefor.

And your orators expressly charge that if the said Guadalupe Bent ever consented to the entry of the said decree at the September term, 1866, of the said district court, said consent was obtained by the importunity and fraudulent and false representations of the said Scheurick, without explanation to the said Guadalupe Bent, of the true meaning, purpose or effect of such decree; and the said Guada-

lupe Bent, in and about the giving of such consent, was entirely ignorant of the effect of the said decree, and ignorant of the former decree whereby the said Alfred, Teresina and Estefana, were invested with the one-fourth part of the said grant.

And your orators further show, on information and belief, that the said Lucien B. Maxwell, or the said Aloys Scheurick, or some other person or persons to your orators unknown, by procurement of the said Maxwell, caused it to be falsely represented to the said district court, that your orators or the said Guadalupe Bent in their behalf had agreed and consented to the setting aside of the said former decree, first herein recited, and to the entry of the said last-mentioned decree, as the same was entered of record at the September term, 1866, of the said district court, and solely by reason of such false representations, and the concealment hereinafter charged, the said district court, without any reference to the master, and without inquiry or judicial examination as to whether the said decree would be beneficial to your orators, gave and entered the said decree.

Your orators are advised by counsel, and therefore aver and charge the fact to be, that the consent and agreement of the said Guadalupe Bent, to the said last-mentioned decree, if such consent or agreement had in fact been voluntarily or intelligently given or made, would have been wholly ineffectual to bind your
14 orators; and that the said last-mentioned decree, so as aforesaid entered at the September term, 1866, of the said district court, and the before-mentioned conveyance of the said Guadalupe Bent to the said Lucien B. Maxwell were, and are, and each of them always was, and now is, wholly void, as against your orators.

Your orators further show that the before-described grant of lands contains two millions of acres or thereabouts, and abounds in valuable mines of gold and silver and valuable deposits of coal and other minerals and metals; that the said grant also contains a large extent, — acres, or thereabouts, of well-watered, irrigable lands, suitable for cultivation; also, extensive forests of pine and other timber trees; and that all the residue of the said lands are valuable for grazing; that the interest and share of your orators therein at the time of the entry of the said decree, at the September term, 1866, of the said district court, was reasonably worth the sum of one hundred thousand dollars and more, and hath ever since been appreciating in value; that the same, in fact, extends beyond the northern border of the Territory of New Mexico; that two hundred thousand acres, or thereabouts, of valuable land being within the limits of the State of Colorado, are, and always were, within the said grant, all of which, as your orators show, on information and belief, was at the time of procuring the said pretended conveyance from the said Guadalupe Bent, well known to the said Lucien B. Maxwell, and was unknown to the said Guadalupe Bent.

And your orators further show that your orators' ancestor, the said Alfred Bent, left a considerable estate in houses and lands, other than said grant, and in moneys and personal property, and the said Guadalupe Bent, your orators' mother, out of the said estate,

was then and always afterwards, well able to support and educate your orators, and neither at the time of the entry of the said decree at the September term, 1866, aforesaid of the said district court, was there any necessity for the sale of your orators' interest in the said lands.

And your orators further show, on information and belief, that all and singular the facts before set forth, touching the extent and value of the said grant, and the estate, real and personal, other than said grant, left by the said Alfred Bent, and the ability of the said Guadalupe, out of the said estate, to maintain and educate your orators, and all and singular the before-mentioned facts touching the execution by the said Guadalupe Bent of the said pretended conveyance to the said Lucien B. Maxwell, and the fraud and imposition practiced upon her in procuring the said conveyance were by procurement of the said Lucien B. Maxwell, concealed from the said district court at the time of the entry of the said last-recited decree at the September term, A. D. 1866, of the said district court.

And your orators are advised that the decree aforesaid so entered at the September term, A. D. 1866, of the said district court, directing conveyance by the said Guadalupe Bent, as guardian *ad litem* of your orators, to the said Lucien B. Maxwell, and vacating and setting aside the said former decree of said district court, is erroneous, in this, to wit: that it appears by the record thereof that the said district court entered the said decree upon the consent merely of parties, without setting forth who assumed to represent your orators, or consent thereto, in your orators' behalf.

Also in this, to wit:—that it appears by the record of the said decree, that although your orators were then infants of tender years, the said decree was made and given by the said district court by and upon consent of parties, merely, and without any reference to the master, or the examination of witnesses or judicial inquiry as to whether in fact such agreement of parties as therein recited had been made, or whether the said decree was or would be beneficial to your orators, or whether any necessity existed for the sale or disposition of your orators' interest in the said grant of lands.

Also in this, to wit:—that it appears by the record of the said decree that the said district court thereby directed that the said Guadalupe Bent should convey your orators' interest in the said lands, for a fixed sum, and to a certain person.

Also, in this, to wit:—that by the record of the said decree, it appears that hereby the said district court directed the conveyance of your orators' interest in the said lands to the said Lucien B. Maxwell by a day certain, and did not fix or limit any day for the payment, by the said Maxwell, of the said sum of six thousand dollars.

Also, in this, to wit:—that it appears by the record of the said decree, the said district court thereby assumed to and did assume to dispose of and convert into money, the freehold estate in lands of your orators, then being, as appears by said records, infants of tender years,—without any reason, cause or necessity existing or

shown to exist for such disposition, or any disposition whatsoever thereof, and without any direction or security for the investment or preservation of the said moneys.

Your orators further show that the decree so as aforesaid entered at the September term, A. D. 1866, of the district court of said Taos county, hath never hitherto been carried into execution; that no such conveyance as in the said decree directed, hath ever been made by the said Guadalupe Bent; nor hath the said Lucien B. Maxwell, nor any one for him, ever paid the moneys therein directed to be paid to the said Guadalupe Bent.

And your orators had well hoped that the said Lucien B. Maxwell, in his lifetime, and the Maxwell Land Grant and Railway Company, assignee of said Maxwell, as hereinafter mentioned, would have refrained and desisted from insisting upon the said last-mentioned decree, or pretending the same to be valid, or seeking to enforce execution thereof.

17 But now, so it is, may it please your honor, the said The Maxwell Land Grant and Railway Company, and the — Lucien B. Maxwell, and the said Luz B. Maxwell, about the year 1870, exhibited in the district court in and for the said county of Colfax, in the Territory of New Mexico, their certain bill of complaint against your orators, and the said Guadalupe Thompson as administratrix of the estate of the said Alfred Bent, George W. Thompson, her husband, and setting forth among other things, the said two decrees of the district court of the said county of Taos, and praying that the trust in the first-mentioned decree established and declared, might be adjudged, terminated and extinguished; that your orators, by George Boyles, their guardian *ad litem*, as also the other defendants, answered the said bill of complaint; that testimony was heard thereon, and a decree entered in the said district court, whereby among other things, it was decreed that the said premises, be, and were held by the Maxwell Land Grant and Railway Company free and discharged of any and all trusts, right, title and interest in or to the same, in favor of, or pertaining to the said Guadalupe Thompson, either in her own right, or as administratrix of the said Alfred Bent, deceased, the said George Thompson, her husband, the said Charles Bent, Alberto Silas Bent, Julianio Bent, or any or either of them, that upon appeal of all the said defendants to the supreme court of said Territory of New Mexico, the said last-mentioned decree was affirmed; and upon further appeal of all the said defendants to the Supreme Court of the United States, the said decree was reversed, and the said cause was remanded into the said supreme court of the Territory of New Mexico, and thence into the district court of the said county of Colfax, and in the said last-mentioned court, the said Maxwell Land Grant and Railway Company, hath amended its bill in divers particulars, but sets up, nevertheless, the decree so as aforesaid entered at the September term, A. D. 1866, of the district court of said Taos county, and relies thereon;

18 and prays, as in its said original bill, before amendment thereof.

All which your orators show is contrary to equity and good conscience.

Your orators further show that by reason of the decree, so as aforesaid, made and given at the September term, A. D. 1866, of the district court of Taos county, aforesaid, and the pretended conveyance by the said Guadalupe Bent of your orators' interest in said premises, your orators have been unable, hitherto, to have execution of the decree made, and given as first afore set forth, or to have partition of the said lands as in the said recited decree directed.

And your orators show on information and belief, that since the entry of the first-mentioned decree, some or all of the commissioners in the said decree mentioned, and therein appointed to make partition of the said lands, have departed this life, or have removed out of said Territory, or are unwilling to act therein; that on or about the — day of July, 1870, the said Lucien B. Maxwell, and the said Luz B. Maxwell, wife of the said Lucien B. Maxwell, by their deed, bearing date the 30th day of April, 1870, conveyed to the Maxwell Land Grant and Railway Company, a corporation organized under the laws of the said Territory of New Mexico, and having an office and place of business at said county of Colfax, all the said grant of lands, except the home ranch, of cultivated lands, in the said deed recited to contain about one thousand acres, and excepting also the following, to wit: the undivided one-half interest in the Montezuma mill, one-half the Montezuma quartz lode, the undivided one-sixth part of the Aztec lode, eight discoveries of quartz lodes, each fifteen hundred feet by one hundred feet, also excepting twelve lots in Elizabethtown, and six certain lots of land in the town of Cimarron City, but excepting from the reservation of the said home ranch, and thereby conveying to the said company the water power upon said home ranch, and the flouring mill erected thereon,

19 and the land whereupon the said mill was built, with so much of the land around and adjoining the said mill and water power, as might be necessary for the convenient, full and free use and enjoyment of the same, with the full and free right of way, in any direction, and at all times, forever, to and from the said water power and mill, over and across the said home ranch, but excepting also from the operation of said deed, such tracts of land as the said Lucien B. and Luz B. had theretofore sold and conveyed by deeds duly recorded on, or prior to the 25th day of January, 1870, and which said lands so by them previously conveyed, the said Lucien B. and Luz B. warranted not to exceed fifteen thousand acres.

And your orators further show on information and belief, that before the execution of the last-mentioned conveyance the said Lucien B. Maxwell and Luz B. Maxwell had conveyed to divers persons whose names and residences are unknown to your orators, certain large tracts of land, parcel of said grant, the particular descriptions and amounts whereof are unknown to your orators (some or all of which said parcels of land your orators show are now held by the grantees of said Lucien B. Maxwell and Luz B., his wife, or those

claiming under them, all and every of whom, when ascertained, your orators crave leave, if need be, to insert herein as parties defendant hereto, with the descriptions of their several possessions as claimed by them with proper and apt words to charge them in that behalf), which said last-mentioned lands, your orators, on information and belief, show are the same lands excepted out of the conveyance of said Lucien B. and Luz B., his wife, to the said Maxwell Land Grant and Railway Company, as by them previously conveyed by deeds recorded.

And your orators further show, on information and belief, that all the said lands, lodes, mining claims, mills and other premises whatsoever so excepted out of the conveyance of the said Lucien B.

and Luz B. to the said company, save those previously conveyed by them to other persons, were by the said Lucien B.

and Luz B. subsequently, but at what time in particular, your orators cannot state, released and conveyed to the said Maxwell Land Grant and Railway Company.

Your orators further show, on information and belief, that afterwards, and on or about the — day of —, A. D. 187—, the said Lucien B. Maxwell departed this life intestate, leaving him surviving the said Luz B. Maxwell, his widow, and as his heirs-at-law, Virginia, wife of one — Keyes, who resides, or is now abiding, in the State of Texas; Peter Maxwell, who resides at Fort Sumner, New Mexico; Amelia, wife of one — Abreu, residing at Fort Sumner aforesaid; Sophia, wife of Telesfor Jaramillo, of Bernalillo county, New Mexico; Pablito, aged sixteen years and Odila, aged ten years, both of whom your orators show reside with the said Luz B. Maxwell, at Fort Sumner aforesaid. That the said Joseph Pley also on or about the — day of —, A. D. 187—, departed this life intestate, leaving Bornigna, his widow, since intermarried with Vicente Mares, of Santa Fé, New Mexico; that the names of the heirs-at-law of said Joseph Pley, save the said Bornigna, are unknown to your orators. That said Leonora Trujillo, Fredrick Miller and Teodora Miller, his wife, also departed this life, but the dates of their respective deaths and the names and residence of their heirs respectively are to your orators unknown.

That said Alexander Hicklin hath also departed this life, and the said Estefana Hicklin is now sole and unmarried, and resides at the county of Pueblo, in the State of Colorado. Your orators further show on information and belief that the Maxwell Land Grant Company, a corporation organized under the laws of the Kingdom of the Netherlands and doing business in said county of Colfax, Cyrus W. McCormick and James M. Walker as purchasers, trustees or otherwise, also claim some right, title or interest in or to the said premises under said The Maxwell Land Grant and Railway Company, by some conveyance, mortgage, trust deed or demise with the particulars whereof your orators are not acquainted.

Your orators further show, on information and belief, that said The Maxwell Land Grant and Railway Company, shortly after receiving the conveyance aforesaid of the said Lucien B. Maxwell

and said Luz B. Maxwell, his wife, entered into possession of divers large tracts of land then being arable within the limits of the said grant, and began to and did cultivate and till the same; and they or the said The Maxwell Land Grant Company ever since have been wont to cultivate and till the said lands; and open divers mines of coal and other metals and minerals within the said grant, and have been wont to extract large quantities of ores, metals and minerals from the said mines, and from the cultivation of the said lands and the sale of the product thereof, and by the sale of the ores, metals and minerals mined and extracted from said mines, said The Maxwell Land Grant and Railway Company and the said The Maxwell Land Grant Company have derived great gains and profits over and above the reasonable cost of improving and tilling such lands, and over and above the reasonable cost of opening and working all such mines; and from the letting of divers other tracts of land within the said grant said companies have derived other large sums of money, one-twelfth part of all whereof as your orators are advised, is in equity payable to your orators.

In tender consideration whereof, and to the end that the said Guadalupe Miranda, who your orators show resides at Carresitos, Mexico, and the said Jesus G. Abreu, surviving executor of the last will and testament of the said Charles Beaubien, deceased, who your orators show resides at the county of Colfax, in the Territory of New Mexico, the said Luz B. Maxwell, who your orators show resides at Fort Sumner, in the Territory of New Mexico,
 22 Petra Abreu and Jesus G. Abreu, her husband, who reside at the county of Colfax, said Territory, Juana Clothier, and Joseph Clothier, her husband, who reside at the county of Taos, said Territory, Pablo Beaubien, Virginia Keyes and — Keyes, her husband, Peter Maxwell, Amelia Abreu and — Abreu, her husband, Sophia Jaramillo, Pablito Maxwell, Odila Maxwell, Bernigna Mares, formerly — Pley, and Vicente Mares, her husband; the unknown heirs of said Joseph Pley, the said Estefana Hicklin, Teresina Scheurick and Aloys Scheurick, her husband, who reside at the county of Taos, New Mexico; and the said Guadalupe Thompson and said The Maxwell Land Grant and Railway Company, the unknown heirs of Leonora Trujillo, and of Frederick Miller and Teodora Miller, his wife, and the said The Maxwell Land Grant Company, Cyrus W. McCormick and James M. Walker, and the said other parties defendant when discovered, may, if they can show why your orators should not have the relief hereby prayed, and may severally true and perfect answer make to all and singular the matters hereinbefore set forth, but not on oath, their oaths and the oath of each of them to their respective answers being hereby expressly waived.

That the decree of the said district court, in and for the said county of Taos, made, given and entered of record, at the May term, A. D. 1865, of the said district court, establishing the right of your orators' ancestor, and said Estefana and Teresina in and to the equal undivided one-fourth part of the said grant of lands, and directing partition thereof may stand and be enforced and carried into execu-

tion in all things; that if need be, other commissioners be appointed to effectuate the said partition; that if need be, an inquiry be had in such manner as the court may direct, as to what lands, if any, have at any time been conveyed by the said Lucien B. Maxwell and Luz B. Maxwell, his wife, or either of them, to any person or persons now holding the same, other than the Maxwell Land Grant and Railway Company aforesaid, that the decree aforesaid, so made and entered at the September term, A. D. 1866, of the district court in and for the said county of Taos be reversed, annulled, and from henceforth held for naught, that the pretended conveyance of your orators' interest in and to the said grant of lands, so as aforesaid pretended to be executed by the said Guadalupe Bent, now Thompson, may be declared null and void, and delivered up to be cancelled; that an account may be taken by or under the direction of the court of the net gains and profits received by said The Maxwell Land Grant and Railway Company and the said The Maxwell Land Grant Company from the cultivation or letting of any of said lands, or the operation of any mines therein, over and above the reasonable cost of such cultivation of said lands, and the reasonable and proper cost of opening and operating said mines, and that one-twelfth part of said net gains and profits be decreed to be paid to your orators.

Or that your orators may have such further relief or such other and different relief as may seem to your honor according to equity and good conscience.

May it please your honor to grant to your orators the most gracious writ of subpoena issuing out of and under the seal of this honorable court directed to the said Guadalupe Miranda, and the said Jesus G. Abreu as surviving executor of the last will of said Charles Beaubien, and said Luz B. Maxwell, Petra Abreu and Jesus G. Abreu, her husband, Juana Clothier and Joseph Clothier, her husband; Pablo Beaubien, Virginia Keyes and — Keyes, her husband; Peter Maxwell, Amelia Abreu, and — Abreu, her husband; Sophia Jaramillo, Pablito Maxwell, Odila Maxwell, Bernigna Mares and Vicente Mares, her husband; the unknown heirs of Joseph Pley, deceased, Estefana Hicklin, Teresina Scheurick, Aloys Scheurick, her husband; Guadalupe Thompson, the Maxwell Land Grant and Railway Company, and said the unknown heirs of Leonora Trujillo and of Frederick Miller and Teodora Miller, his wife; and the said The Maxwell Land Grant Company, Cyrus W. McCormick and James M. Walker, commanding them on a day certain therein to be named and under a certain penalty, to be and appear in this honorable court, then and there to answer the premises, and stand to, abide and perform the order of the court.

And as in duty bound your orators will ever pray, &c.

CHARLES BENT.

CALDWELL YEAMAN &
E. L. SMITH, *Of Counsel.*

United States District Court, County of Taos, September Term,
1865.

ALFRED BENT, ESTEFANA HICKLIN and ALEX-
ander Hicklin, Her Husband; Teresina
Bent Alias Teresa T. Bent and Aloys Scheu-
rick, Her Husband, and also by Her Next
Friend, Ceran St. Vrain, Complainants,

vs.

GUADALUPE MIRANDA, JOSEPH PLEY, LUZ
Beaubien and Lucien B. Maxwell, Her
Husband, and the said Maxwell, Leonora
Beaubien, Petra Beaubien and Jesus G.
Abreu, Her Husband; Teodora Beaubien
and Frederick Miller, Her Husband;
Juana Beaubien and Joseph Clothier, Her
Husband, and Pablo Beaubien, Minor, and
the said Frederick Miller, His Guardian,
and Vidal Trujillo, the Husband of the
said Leonor Beaubien, Defendants.

Bill in Chancery for
Partition of Real
Estate.

And now on this day came the parties, by their counsel, and this
cause having been at a former term of this court heard upon the
bill and amended bill, and the answer thereto, the supplemental
bill and the answer, and the testimony herein on file as taken in the
cause; which cause was taken under advisement by the court as
to the decree which should be made in the premises, and the
court being fully advised. In consideration whereof, therefore, it
is ordered, adjudged and decreed by the court that the said
complainants, Alfred Bent, Estefana Hicklin and Teresina, other-
wise Teresa T. Bent, be, and hereby are, declared to be the
26 natural son and daughters of the said Charles Bent, in the
said bill mentioned, by him begotten upon and conceived
and born of Ygnacio Jaramillo, within the Territory of New Mexico,
formerly the department or province of New Mexico, and at the
time the said Alfred, Estefana and Teresa were begotten and con-
ceived, no lawful impediment existed to prevent the said Charles
Bent and Ygnacio Jaramillo from in due form of law solemnizing
a contract of marriage the one with the other; that as such natural
children, the said Alfred, Estefana and Teresa, in the absence of
any child or heir born in wedlock to the said Charles Bent, became
and were at the time of his decease, the true and lawful heirs of
his body in this Territory, with the full power, rights and au-
thority to inherit, succeed to, and receive the estate, property, rights
and interests of property of the said Charles Bent in the said
Territory, and that as such children and heirs they are justly
and lawfully entitled to have, maintain, recover, possess and enjoy
all the rights, interest and estate which in law or equity belonged

or pertained to the said Charles Bent at the time of his decease, of, in or to the lands, real estate or grant as described and set forth in the complainants' bill, and the exhibit therein referred to, which description is as follows, to wit: Commencing below the junction of the Rayado river with the Colorado; thence in a direct line to the east to the first hills, and from thence running parallel with said Colorado river to the north, to a point in front of the junction of the Uña de Gato with the said Colorado river, thence following said hills to the east of the said river of the Uña de Gato, to the summit of the mesa, thence turning to the northeast along said summit to the summit of the mountain that separates the waters that flow to the east from those that flow to the west, and from thence following the said mountain to the south to the first ceja, south of the Rayado river, and from thence following the summit of first ceja east to the place of beginning.

27 It is further ordered, adjudged and decreed that the said Charles Bent, at the time of his decease, was justly and equitably entitled and seized of one undivided fourth part of the estate in and to the said tract of land, real estate or grant, and that the said Charles Beaubien and Guadalupe Miranda were at said time so entitled and seized of an equal undivided share of the remaining three-fourths of the said tract or grant.

Furthermore, that the said Alfred, Estefana and Teresina (alias Teresa T.), upon the decease of their said father; inherited succeeded to, and became seized of the said undivided one-fourth part, interest and estate which belonged or pertained to the said Charles Bent, in law and equity, in and to the land or real estate, in the entire tract or grant aforesaid, at the time of his decease, and that the said Alfred, Estefana and Teresina are now fully and absolutely entitled to and seized of the undivided one-fourth part of the interest and estate of the said tract of land or grant.

Furthermore, that the said undivided one-fourth part in and to the said tract or grant of land, or real estate, be and hereby is, declared, established and confirmed to them, the said Alfred, Estefana and Teresina (alias Teresa T.) and to their heirs and assigns forever, with the full and perfect right, powers and authority to possess and enjoy the same.

It is further ordered, adjudged and decreed that a just and equitable partition be made of the said tract of land or grant between the said Alfred, Estefana and Teresina, and the said daughters and son of the said Charles Beaubien, deceased, defendants herein, and Lucien B. Maxwell, the assignee and grantee of the said Guadalupe Miranda, according to the rights, interests and estate hereinabove declared between the respective parties.

Furthermore, that the special commissioners hereinafter appointed to make and allot the said partition shall first take and subscribe an oath before the judge or clerk of this court, the clerk of the court of probate for the county of Mora, or the justice of the peace within and for the precinct including the county-seat of said county, to well and faithfully, without partiality, prejudice, favor, or ill will, to the best of their knowledge, understanding, skill and

abilities, make a partition and allotment of the said tract of land or grant, between the parties, and in the manner and form prescribed and required in this decree, and the said oath so taken and subscribed shall be duly certified by the officer administering the same, and by the commissioners annexed to and returned with the report by them to be made to this court. That when the oaths shall be so taken and subscribed, the said commissioners shall jointly proceed in person upon the said tract or grant, and without any unnecessary delay, and shall inspect the same throughout its extent, and especially the streams and springs of water and their capacities, one year with another, to supply water for the purpose of irrigating the lands connected with or contiguous to the said streams or springs, susceptible of cultivation and irrigation; the mines and minerals of whatsoever description; the quarries of rock or stones; timber for building, fencing and fire-woods; the lands suitable for plowing, planting and sowing, and grounds — and for pasturage.

They shall then make a partition of the said tract or grant, according to quantities, quality and value, and designate and describe the tracts or partitions divided by such descriptions, and natural and artificial objects or marks or boundaries, as shall remain plain and permanent and easily found. They shall part and lay off one-fourth part of the said tract or grant and divide, part and lay off the remaining three-fourths of the same into two equal parts. In making the said partition of the one-fourth and of the said three-fourths, regard shall be had to the buildings, acequias, cultivation and improvements made by the said Lucien B. Maxwell upon the said tract or grant of land, and nothing shall be credited to

29 the other parties, or charged and considered against the said Maxwell for any buildings, acequias, cultivation or improvements made and added to the said tract or grant of land by him, or by persons holding and possessing by or through him in good faith. This shall have special reference to the commencement of this suit upon the twelfth day of September, one thousand eight hundred and fifty-nine, and to the principal places and portions then occupied and improved by him and those by or under him. That in making and allotting the parts herein decreed, ordered and adjudged to be partitioned, the portions which shall be partitioned and allotted to the said Maxwell shall include the portions of said tract or grant which the said Maxwell, or those under or through him occupied and had cultivated and improved before the commencement of this suit, and since continued to occupy and improve, and the chief and principal portions the said Maxwell has occupied and improved since the commencement of this suit.

In case the said Maxwell, since the commencement of this suit, has by himself or others in parts of said tract or grant remote from the principal farms and improvements actually occupied by him, made slight or temporary cultivations or improvements which shall include the lands and waters in such manner as to leave not an equitable and just portion of the waters and cultivated lands to be parted to the other parties in this cause, then and in such case the said remote lands and waters included in such improvements or

slight cultivations shall in the partition to be made in this cause, be considered and included in the said partition, the same as if the said improvements were not made upon the said lands. In such case the commissioners shall assess the just and true value of the lands covered by such improvements without their being added to the said lands, and also the said improvements by themselves, exceeding the just and true value of them over and
30 connected with the said lands, and report the facts with their general report to this court, carefully noting the different assessed values, so that the court may decree justly and equitably concerning the same between the parties.

Furthermore, when the commissioners shall have parted the tract or grant of land as herein provided, they shall allot the one-fourth part to the said Alfred, Estefana and Teresina, (alias Teresa T.) Bent; and an equal portion of the said three-fourths, the one to the said Lucien B. Maxwell, and the other to the said son and daughters of the said Charles Beaubien, deceased.

In estimating the value of any improvements referred to herein, as made in certain remote places, and under the circumstances specified, the commissioners will also assess and report the value of the rents and profits since such places have been occupied and cultivated.

In parting and allotting to the said Maxwell the portion to be allotted to him, the said commissioners are hereby specially charged to estimate in the partition the lands which include the buildings, acequias, farms and other improvements by him made, or by others through or under him, in good faith, without reference to the value of any of the said improvements, but this provision does not extend to the aforesaid remote places, and the improvements hereinabove specially specified as connected therewith.

It is further ordered, adjudged and decreed, that Lucien Stewart, of Taos county, and Vicente Romero and William Kroenig, of the county of Mora, in said Territory, be, and they hereby are, appointed to execute and perform all the requirements and provisions of this decree, required of, and to be done by commissioners, and that they make full, plain and exact report of their proceedings to the next term of this court.

Furthermore, it is ordered, adjudged and decreed, that the
31 said complainants pay to the said defendants, Maxwell, and the said daughters and son of the deceased Charles Beaubien, the sum of one hundred dollars, the one-fourth part of the amount expended towards the procuring of the confirmation of the said tract or grant of land by the Government of the United States.

The court now reserves and suspends making its decree as to the partition and payment of the costs in this cause until a future term of this court.

It appearing to the satisfaction of this court, upon the suggestion of the complainants that, since the last term of this court, Leonor Beaubien has been regularly and lawfully divorced from the bonds of matrimony before existing between her and the said Vidal Tru-

jillo, it is ordered by the court that he be, and hereby is, dismissed from these proceedings and that the clerk furnish a copy of this decree to the said Maxwell and also to the commissioners, and one for the said son and daughters, should these latter require the same, and that this cause stand continued until the next term of this court.

Signed, June 3, 1865.

KIRBY BENEDICT,
Chief Justice.

32 And afterwards, to wit: on the 27th day of March, 1883, there was filed in said clerk's office, the following demurrer; which said demurrer is in words and figures as follows, to wit:

No. 435.

TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court of the First Judicial District of the Territory of New Mexico, Sitting in and for the County of Colfax. In Chancery.

CHARLES BENT *et al.*

vs.

THE MAXWELL LAND GRANT AND RAILWAY CO. *et al.* }

The joint and several demurrer of The Maxwell Land Grant and Railway Company, The Maxwell Land Grant Company, Cyrus W. McCormick, Guadalupe Miranda, Luz B. Maxwell, Petra Abreu and Jesus G. Abreu, Juana Clouthier and Joseph Clouthier, Pablo Beaubien, Virginia Keyes, Peter Maxwell, Sophia Jaramillo, Pablito Maxwell, Odila Maxwell, Teresina Scheurick and Aloys Scheurick, and Estefana Hicklin, certain of the defendants, to the bill of complaint of Charles Bent and Juliano Bent and Alberto Silas Bent, the last two being infants, by George W. Thompson, their next friend.

33 These defendants, by protestation, not confessing any of the matter, in and by said bill complained of, to be true in manner and form, as the same are set forth, severally say that they are advised that there is no matter or thing in said bill good and sufficient in law to call these defendants to account in this honorable court for the same; but that there is good cause of demurrer thereto, and they do demur accordingly; and for causes of demurrer say, that said bill, in case the same were true, contains no matter of equity whereon this court can ground any decree, or give complainants any relief as against these defendants.

And for further and special causes of demurrer they say:

First.

That it appears from the said bill of complaint, that all the matters and things set forth in the said bill and the issues involved

therein, are involved in another cause, now pending in this court, wherein all the necessary parties to the said bill are parties.

Second.

That the said bill is brought to reverse and annul a decree made and entered by consent, as appears upon the face of the decree itself, without making any sufficient showing that said consent was not given.

Third.

That said bill is in fact a bill of review, brought to reverse and annul a decree rendered by consent, and does not set forth facts sufficient to entitle complainants to the relief prayed for.

Fourth.

That the said bill in effect seeks to re-establish a decree that has been set aside and annulled by the court which rendered it, without any showing that the decree sought to be re-established was a proper decree, or well founded either in law or in fact.

Fifth.

34 That the said bill appears to be brought on behalf of Juliano Bent and Alberto Silas Bent, infants, by one George W. Thompson, as their next friend, without any leave of court being given to the said Thompson to file the same in behalf of said infants, and without said Thompson being lawfully appointed as next friend of said infants.

Sixth.

Said bill does not show that the complainants are entitled to have the said decree that was set aside reinstated or enforced or that said decree was a lawful or proper decree under the circumstances and evidence and pleadings of that cause.

Seventh.

Said bill does not show sufficient facts to entitle the complainants to have the decree entered by consent set aside, or to have the one that had been set aside by the court reinstated and enforced.

Eighth.

Said bill is uncertain, vague, deficient, imperfect, indefinite in its allegation, and does not allege sufficient state of facts to entitle the complainants to the relief prayed for.

FRANK SPRINGER,
T. B. CATRON,
Solicitors for Defendants.

TERRITORY OF NEW MEXICO, }
County of San Miguel. }

I, Thomas B. Catron, one of the solicitors for the defendants in the above-entitled cause, do hereby certify that in my opinion the

foregoing demurrer is well founded in point of law, and being duly sworn, on my oath say that said demurrer is not interposed for delay.

T. B. CATRON,
One of Counsel for Defendants.

Subscribed and sworn to before me, this 24th day of March, 1880.
[SEAL.] J. D. W. VEEDER,
Notary Public.

35 And afterwards, to wit: on the 27th day of November, 1883, there was filed and entered of record in said clerk's office the following order of court, which said order is in words and figures as follows, to wit:

CHARLES BENT *et al.*

vs.

THE MAXWELL LAND GRANT AND RAILWAY CO. *et al.* }

The demurrer of the respondents to the bill of complaint of the complainants herein having been heard on a former day, and the same having been argued by counsel for the respective parties and submitted to the court, and the court being now sufficiently advised in the premises, it is considered, ordered and adjudged that said demurrer be sustained, and that said bill be dismissed at the costs of complainant, taxed at —.

S. B. AXTELL,
Chief Justice, etc.

And afterwards, to wit: on the 10th day of September, 1884, there was filed in said clerk's office the following mandate from the supreme court of the Territory of New Mexico, which mandate is in words and figures as follows, to wit:

No. 435.

In District Court, Colfax County.

CHAS. BENT *et al.*

vs.

GUADALUPE MIRANDA *et al.*

} Mandate from Supreme Court.

The Territory of New Mexico to Samuel B. Axtell, chief justice of the supreme court of the Territory of New Mexico and judge of the first judicial district court thereof, sitting in and for the county of Colfax, Greeting:

36 Whereas in a certain suit in chancery lately pending before you wherein Charles Bent *et al.* were complainants and The Maxwell Land Grant and Railway Company *et al.* were defendants, on the 27th day of November, 1883, by your consideration in that behalf, the demurrer of the said defendants to the bill of complaint of the said complainants was sustained and the said bill dismissed at

the cost of complainants; and whereas afterwards the said cause was brought into our supreme court by writ of error by the said complainants, whereupon such proceedings were had in our said supreme court, that at the January, 1884, term thereof, it was considered that the judgment and decree aforesaid, by you in form aforesaid given be reversed and that said cause be remanded to your court with directions to render decision and decree therein overruling said demurrer, and to thereafter proceed according to law and the practice of the court.

Therefore you are hereby commanded that without delay you reinstate said cause upon your docket and further proceed therein according to law.

Witness the Honorable Samuel B. Axtell, chief justice of the supreme court of the Territory of New Mexico, and the seal of said court this 10th day of September, A. D. 1884.

C. M. PHILLIPS, *Clerk.*

37 And afterwards, to wit, on the 16th day of September, 1884, there was filed and entered of record in said clerk's office, the following decree of court, which decree is in words and figures, as follows, to wit:

38 *Decree.*

No. 435.

TERRITORY OF NEW MEXICO, {
County of Colfax. }

District Court.

CHARLES BENT *et al.* }
vs. } In Chancery.
GUADALUPE MIRANDA *et al.* }

Now on this day comes the parties hereto, the complainants by their solicitors, Messrs. Wells, Smith & Macon and Caldwell Yeaman, Esq., and the respondents by their solicitors, Messrs. Frank Springer and T. B. Catron. And on filing and reading the mandate of the supreme court of the Territory of New Mexico, by which this cause, heretofore taken by writ of error from this court to the said supreme court, is remanded to this court with directions to reinstate the same upon the docket of this court, and that a decree be rendered herein overruling the demurrer to the bill of complaint, and that the proceedings thereafter be according to law and the practice of this court.

And the court being now sufficiently advised in the premises, it is considered, ordered and decreed that the said judgment of the said supreme court of the Territory of New Mexico, be, and the same is, hereby made the judgment and decree of this court. That this cause be now reinstated upon the docket of this court, and that the demurrer heretofore filed by respondents to the bill of the complainants herein, be, and the same is hereby overruled, with costs.

It is further considered and ordered that respondents have thirty days from this date in which to answer said bill and that said complainants have thirty days, from and after the expiration of the thirty days allowed respondents, in which to file exceptions or a reply to said answer.

S. B. AXTELL,
Judge First Dist.

39 And afterwards, to wit: on the 24th day of October A. D. 1884, there was filed in said clerk's office the answer of the Maxwell Land Grant Company, which said answer is in words and figures as follows, to wit:

Answer of the Maxwell Land Grant Co.

No. 435.

TERRITORY OF NEW MEXICO, {
County of Colfax. }

In the District Court for the First Judicial District, Sitting within and for the County of Colfax.

CHARLES BENT, JULIANO BENT, and ALBERTO SILAS	} In Chancery.
BENT	
vs.	
THE MAXWELL LAND GRANT AND RAILWAY COMPANY and Others.	

40 The answer of the Maxwell Land Grant Company to the bill of complaint of Charles Bent, Julianio Bent, and Alberto Silas Bent, complainants.

This defendant, saving and reserving all manner of benefit and advantage to itself of exception to the many errors and insufficiencies in the said bill of complaint contained, for answer thereto, or to such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

This defendant admits the grant of lands by the Republic of Mexico to the said Charles Beaubien and Guadalupe Miranda and the confirmation thereof by Congress as stated in said bill.

This defendant admits that about the 12th day of September, 1859, Alfred Bent, Estefana Hicklin and Teresina Beet exhibited their bill in equity against the said Beaubien and Miranda and others, alleging and praying, as in the bill stated; that the several persons were made parties thereto, as stated, and that a decree was made and entered of record in said suit on or about the third day of June 1865, the purport and tenor whereof was as in said bill stated, but this defendant denies that the said Alfred, Estefana and Teresina were, or by the said decree were adjudged to be, the heirs-at-law of the said Charles Bent, or as such heirs fully and absolutely entitled to or seized of the undivided one-fourth part of the said

grant of lands, or that the said undivided one-fourth part of the said grant of lands was established or confirmed to them the said Alfred, Estefana and Teresina and to their heirs and assigns forever; but this defendant avers, to the contrary thereof, that the said decree was an interlocutory decree merely, and not final; that no legal estate or title was thereby determined, established or confirmed; that the said decree was never perfected, completed or made final so that the same could be appealed from and reviewed by an appellate court; that the said decree was wholly unwarranted by the pleadings and proofs in said cause and should have been
 41 reversed, if the defendants thereof had had an opportunity to appeal therefrom; that the agreement upon which the bill therein was founded, was, as appears from the said bill itself, void, without consideration, and against public policy; that the fact of such agreement or any agreement upon which said decree could have been founded was denied, in the sworn answers of the said Beaubien and Miranda, who were by said bill required to answer the same upon oath; that no evidence whatever was offered, proving the fact of said alleged agreement, all of which matters appear by the pleadings and proofs in said cause and this defendant craves leave at the hearing, to refer to the original or some duly authenticated copy thereof.

This defendant admits the conveyances by the said Miranda and the heirs of the said Charles Beaubien and said Lucien B. Maxwell as stated in said bill.

This defendant admits that the said Alfred Bent departed this life at about the date in said bill stated, but denies that he departed this life intestate, or that he left, as his sole heirs-at-law the said complainants, Julianio Bent, Alberto Silas Bent and Charles Bent, or any or either of them. It admits that the said complainants were made parties complainants in said cause, as in the bill stated, and that an order was made at the April, 1866, term of said court, whereby the said Guadalupe Bent was appointed guardian *ad litem* and commissioner in chancery for the minors of Alfred Bent, but denies that the same was with full power to carry into execution all sales or transfers made of her interests in and to the real estate therein described, as in said bill stated.

This defendant further admits that at the September term 1866, of the said district court begun and held on or about the 10th day of September, 1866, at, within and for the county of Taos, a certain decree was made and entered of record, wherein after reciting the aforementioned decree appointing commissioners to divide and set
 42 apart the one-fourth part of the said lands to the complainants in that said cause, and that said decree had never been carried into effect, and that since the rendition thereof, a mutual agreement had been made between the parties to that cause, settling and determining all the equities in the same, it was ordered, adjudged and decreed, that the decree aforesaid, and all orders made under it by virtue of the same, should be set aside, and in which it was further recited, ordered, adjudged and decreed as in the bill stated.

This defendant admits that by the record of said last-mentioned decree it doth not appear by whom the said complainants were represented in that behalf, and that it does appear that no time was limited to the said Maxwell for the payment of the said eighteen thousand dollars, and that no day was in the said decree allowed to said complainants after coming to their majority to show cause against said decree, but it avers that the said complainants were represented in that behalf by one Merrill Ashurst, an attorney of the said court and by other counsel; that the said sum of eighteen thousand dollars had prior to the making and entering of said decree, already been duly paid by the said Maxwell to the complainants in said suit, and that the court was not required as this defendant is advised to allow to the said complainants such day in court.

This defendant admits that about the month of May 1866, the said Aloys Sheurick and Teresina, his wife, and the said Alexander Hicklin and Estefana, his wife, conveyed the interests of said Teresina and Estefana to the said Maxwell, as stated, and that on or about the 3d day of May, 1866, the said Guadalupe Bent also executed her deed of conveyance, in substance as in said bill stated and avers that by the said deed of conveyance the said Guadalupe Bent did grant, bargain, sell and convey unto the said Lucien B. Maxwell the certain real estate in said bill described, being the undivided one-twelfth part of the grant of lands aforesaid, as in and by the said deed will more fully appear.

43 This defendant denies that the said Guadalupe Bent is a Mexican woman, and denies that at the time of the execution of her said deed she was unfamiliar with business, or the proceedings of courts of law or unacquainted with the rights of complainants or her duties in that behalf, or the bounds or extent of the said grant, or the character or value thereof, or was ignorant of the confirmation of the said grant by the act of Congress aforesaid; or was ignorant of the decree of said district court, directing partition of the said grant; or of what part or share in said grant was claimed by complainants' father in his lifetime.

This defendant is informed and believes and therefore admits, that the said Guadalupe Bent was wont to consult with and rely upon the advice of the said Aloys Sheurick, and that she reposed special trust and confidence in the said Sheurick, as stated in said bill.

The defendant denies that the said Lucien B. Maxwell was at that time and long before that, a man of great wealth, or was possessed of great power and influence throughout the said county of Taos, and Territory of New Mexico, or that the said Maxwell knowing the weakness and ignorance of the said Guadalupe Bent, or her inexperience in matters of business and proceedings in courts, or her want of information as to the extent, character or value of said grant, or her ignorance of the act of Congress confirming said grant, caused or procured said Guadalupe Bent to be appointed guardian *ad litem* for said complainants, or procured the said conveyance to be prepared for execution by the said Guadalupe Bent, or caused

the same to be written in the English language, or caused or procured the said Aloys Sheurick to believe or represent, or that the said Sheurick by procurement of the said Maxwell or otherwise, did represent to the said Guadalupe Bent, that the said grant of lands was for the most part fit only for grazing; that the same contained little or no mineral of value, or that the same extended only to the north line of said Territory of New Mexico, as
 44 then constituted; or that he, the said Maxwell, was the owner of the major part of said grant, or was buying or about to purchase the shares and interests of all other owners therein, and might or would control the whole of said grant and exclude said complainants from all share and part thereof; or that unless she should accept the sum of six thousand dollars, neither she nor said complainants would ever realize anything for the interest of complainants in said grant. It admits that the said Sheurick did represent to said Guadalupe Bent, that the said Maxwell would pay to her six thousand dollars for the interests she represented, and that she was duly authorized to sell and convey the same.

And this defendant avers that prior to about the year A. D. 1862, the said grant was wholly included within the Territory of New Mexico, as then constituted, and that at the time when said decree of September, 1866, was made, the boundary line between the Territory of New Mexico and Colorado had not been surveyed, and its exact location was not known, but it was generally supposed in New Mexico, that the latter Territory extended so far north as the town of Trinidad.

This defendant denies that the said Guadalupe Bent executed the said conveyance, confiding in the representations of said Scheurick, so as in the said bill alleged to have been made to her, or moved or induced by said representations, or by the great wealth, power and influence of the said Lucien B. Maxwell.

This defendant denies that neither at the time of the execution of the said conveyance, nor at any time before that, was the said conveyance read, interpreted or explained to her, or that the same was executed without the advice of counsel, or that at the time of execution thereof, the said Guadalupe Bent was in entire ignorance of the character or extent of the said grant, or the value thereof, or of the rights and shares of complainants therein, or was believing or confiding in all and singular the representations in said bill
 alleged.

45 This defendant denies that neither then nor at any time afterwards did the said Lucien B. Maxwell, pay to the said Guadalupe Bent, nor to any one for her, the said sum of six thousand dollars, but avers that the said sum of six thousand dollars was, prior to the said September term, A. D. 1866, of the said district court, to wit: on or about the 3rd day of May, 1866, duly paid by the said Lucien B. Maxwell to the said Guadalupe Bent.

This defendant denies that neither at the time of the said last-recited decree, at the September term, 1866, of the said district court, nor at any time before that, did the said Guadalupe Bent, nor the counsel or solicitor of the said Guadalupe Bent, nor any other per-

son authorized to agree or consent for said complainants in that behalf, in fact, agree or consent as in said last-mentioned decree is recited, or agree or consent to the entry of the said last-mentioned decree, nor to the vacation or setting aside of the former decree first in said bill above recited, or that the said order and decree was procured to be entered in the absence of the said Guadalupe Bent, or without notice to her of any intention to apply therefor. It denies that such consent was obtained, by the importunity and fraudulent or false representations of the said Scheurick, or without explanation to the said Guadalupe Bent of the true meaning, purpose or effect of such decree, and avers that if such consent was so as aforesaid obtained it was without the procurement of the said Lucien B. Maxwell. And it denies that in and about the giving of such consent, the said Guadalupe Bent was ignorant of the effect of the said decree, or ignorant of the former decree purporting to invest the said Alfred, Teresina and Estefana with the one-fourth part of said grant.

This defendant denies that the said Lucien B. Maxwell, or the said Aloys Scheurick, or any other person or persons by procurement of the said Maxwell, caused it to be falsely represented
46 to the said district court, that the said complainants or the said Guadalupe Bent in their behalf, had agreed and consented to the setting aside of said former decree, in said bill first recited, and to the entry of the said last-mentioned decree, or that by reason of such alleged false representations, or the concealments in said bill charged, or without reference to the master, or without inquiry or judicial examination as to whether the said decree would be beneficial to said complainants, the said district court gave and entered the said decree.

This defendant, upon advice of counsel, denies that the consent or agreement of the said Guadalupe Bent was, or would have been ineffectual to bind said complainants or that the said last-mentioned decree, entered at the September term, 1866, of the said district court, and the before-mentioned conveyance of the said Guadalupe Bent, to the said Lucien B. Maxwell, were or are, or either of them was or is void, as against said complainants.

This defendant denies that the said grant contains two million of acres or thereabouts, or abounds in valuable mines of gold or silver, or that the interest or share of said complainants therein, at the time of the entry of the said decree, at the September term, 1866, of the said district court was reasonably worth the sum of one hundred thousand dollars and more, or any sum whatever, or that the said complainants then or ever had any interest or share of said grant of lands. It admits that the said grant extends beyond the northern border of the Territory of New Mexico, and that two hundred thousand acres, or thereabouts, of land within the limits of the State of Colorado, are within the limits of said grant, but it avers with reference thereto, that the said grant was wholly included within the Territory of New Mexico, until about A. D. 1862, when the Territory of Colorado was organized, and that the boundary between Colorado and New Mexico was not surveyed or located until the year A. D. 1868,

47 and that prior to said last-mentioned year, said boundary was generally supposed by persons living in New Mexico, to be in the vicinity of the town of Trinidad, and that according to such supposition, the whole of said grant would lie within the Territory of New Mexico.

This defendant, on information and belief, denies that the said Alfred Bent left a considerable estate in houses and lands, other than the said grant, and in moneys and personal property, or that the said Guadalupe Bent, out of the said estate, was then or always or at any time afterwards, well able to support and educate complainants, and denies that the said Alfred Bent or complainants owned or possessed any part of, or interest in said grant.

This defendant denies that all and singular the facts in said bill alleged, touching the extent and value of the said grant, or the estate, real and personal, other than said grant, left by the said Alfred Bent, or the alleged ability of the said Guadalupe, out of the said estate to maintain and educate complainants, or the facts, as alleged, touching the execution by the said Guadalupe Bent of the said conveyance to Lucien B. Maxwell, or the alleged fraud and imposition practiced upon her in procuring the said conveyance, were by the procurement of the said Lucien B. Maxwell, or otherwise, concealed from the said district court at the time of the entry of the said decree at the September term, A. D. 1866, of said district court.

This defendant, upon the advice of counsel, denies that the said decree so entered at the September term, A. D. 1866, of the said district court, directing conveyance by the said Guadalupe Bent as guardian *ad litem* of complainants to the said Lucien B. Maxwell and vacating and setting aside the said former decree of said district court, is erroneous as in said bill alleged in this, to wit: that it appears by the record thereof that the said district court, entered
48 said decree upon the consent merely of parties, without setting forth who assumed to represent complainants, or consent thereto, in complainants' behalf. Or in this, to wit: that it appears by the record of the said decree that although said complainants were infants of tender age, the said decree was made and given by the said district court by and upon consent of parties merely, and without any reference to the master, or the examination of witnesses or judicial inquiry, as to whether in fact such agreement of parties as therein recited had been made, or whether the said decree was or would be beneficial to said complainants, or whether any necessity existed for the sale or disposition of said complainants' alleged interest in the said grant of lands. And this defendant denies that it appears by the record of said decree so as above in this paragraph, and in said bill recited.

Or in this, to wit: that it appears by the record of the said decree, that the said district court thereby directed, that the said Guadalupe Bent should convey said complainants' interest in the said lands for a fixed sum and to a certain person.

Or in this, to wit: that by the record of said decree, it appears that thereby the said district court directed the conveyance of said

complainants' interest in the said lands to the said Lucien B. Maxwell by a day certain, and did not fix or limit any day for the payment by the said Maxwell of the said sum of six thousand dollars.

Or in this, to wit: that it appears by the record of the said decree, the said district court thereby assumed to and did assume to dispose of and convert into money the freehold estate in lands of said complainants, thus being infants of tender years, without any reason, cause or necessity existing, or shown to exist for such disposition, or any disposition thereof, and without any direction or security for the investment or preservation of the said moneys, and defendant denies, that it appears by the record of the said decree so as above, in this paragraph and in said bill recited.

49 And this defendant denies that the said complainants ever had any freehold estate in the said lands; or any estate or interest therein; but avers that if they had any interest whatever therein, the same was not a legal estate or interest, but only a mere equitable interest therein; that the said decree at the September term, 1866, of said district court, was made and given for the purpose of carrying into effect upon the record a compromise of the then pending and undetermined litigation between the parties touching such alleged equitable interest or claim; that the said compromise had in fact been fully made and completed some months prior to the making of the said decree, settling and determining all the equities in that said suit, and that the deeds in said decree, required to be executed, had already been executed and delivered to said Lucien B. Maxwell, and the said Lucien B. Maxwell had already paid to the complainants in that said suit, the sum of eighteen thousand dollars, including the sum of six thousand dollars to the said Guadalupe Bent, and that the said decree was in fact intended and treated as a confirmation by the said court of the said compromise, conveyances and payments. And this defendant denies that said decree hath never been carried into execution, or that no such conveyance as in said decree directed, hath ever been made by the said Guadalupe Bent, or that said Lucien B. Maxwell, or any one for him hath never paid the moneys therein directed to be paid to the said Guadalupe Bent.

This defendant admits, that the said, The Maxwell Land Grant and Railway Company and Lucien B. Maxwell and Luz B. Maxwell, about the year 1870, exhibited in the district court, in and for the said county of Colfax, in the Territory of New Mexico, their certain bill of complaint against said complainants, and the said Guadalupe Thompson, as administratrix of the estate of the said Alfred Bent and the said George W. Thompson, her husband, setting forth among other things the said two decrees of the
50 district court of the said county of Taos, and praying among other things that the trust, in the first-mentioned decree established and declared, might be adjudged, terminated and extinguished; that the said now complainants, by George Boyles, their guardian *ad litem*, as also the other defendants in that said suit, answered that said bill of complaint, and that the further proceed-

ings in that said suit were had as in the bill alleged. And this defendant avers that that said suit is now pending, and is set down for final hearing upon the merits thereof; that the same involves all the issues that are presented in this suit; that all the necessary parties to this suit are parties thereto; that the same is pending in a court having full jurisdiction of the parties and subject-matters of this suit, and this defendant is advised and insists, that the pendency of that said suit, is a bar to the prosecution of this suit, and it craves the same benefit of this defense in this its answer, as if it had availed itself thereof by plea.

As to whether the said complainants by reason of the said decree of September, 1866, and the conveyances by the said Guadalupe Bent, have been unable to have execution of the said decree of partition, as in said bill alleged, this defendant is advised, and insists, that the said complainants were complainants in the said suit in which the said decree of partition was made, and could at all times have proceeded in that said suit to take the same steps, and ask the same relief as they seek in this suit.

This defendant admits the death of some of said commissioners, and the conveyance by said Lucien B. Maxwell and wife, the death of the said Maxwell and other parties as in the bill alleged, and that this defendant claims some interest in the said lands under the said Maxwell Land Grant and Railway Company as alleged.

This defendant denies that the said, The Maxwell Land Grant and Railway Company, or this defendant have cultivated or tilled, 51 large tracts of land within the limits of the said grant, or opened divers mines of coal and other metals and minerals, and have been wont to extract large quantities of ores, metals and minerals from the said mines, or that from the cultivation of the said lands or the sale of the products thereof, or the sale of the ores, metals and minerals, mined or extracted therefrom, or from the letting of divers other tracts of land within the said grant, the said companies or either of them have derived great gains or profits, or that any part thereof is payable to said complainants.

And this defendant further answering says that the said The Maxwell Land Grant and Railway Company, by its two certain trust deeds, dated the 13th day of June, A. D. 1870, and the 1st day of November, A. D. 1872, respectively, conveyed the said grant and tract of land, with certain small reservations in said trust deeds specified, unto Thomas A. Scott and Samuel M. Felton and the Farmers' Loan and Trust Company, as trustees to secure the payment of certain mortgage bonds, issued and sold by the said Maxwell Land Grant and Railway Company. That afterwards, on or about the 27th day of March, A. D. 1880, the said grant and tract of land was sold at public auction by one F. W. Clancy, as master in chancery; pursuant to two certain decrees of foreclosure of the said trust deeds rendered by the district court of the first judicial district of the Territory of New Mexico, sitting in and for the county of Colfax, and by proper deeds duly conveyed to one Frank R. Sherwin and one Lucien Birdseye jointly at and for the sum of one million, one hundred thousand dollars, and that afterward, on

or about the 31st day of May, 1880, the said Frank R. Sherhin and Lucien Birdseye, who this defendant avers had purchased the same at said master's sale for and on behalf of this defendant, did by their certain deed of that date, duly convey the said grant and tract of land so purchased by them to this defendant. All of which will more fully appear by reference to copies of the said several trust deeds, decrees, master's deeds and conveyances, which this defendant craves leave to file herewith as a part of this its answer, and to refer to the same at the hearing.

And this defendant further answering says, that it is advised that the said decree of the said district court for the county of Taos, made on or about the 3d day of June A. D. 1865, was an interlocutory decree, rendered upon a bill brought to establish an equitable interest in an undivided share of the said grant and tract of lands, and for a partition thereof. That the said bill was founded upon an alleged parole agreement by the said Guadalupe Miranda and Charles Beaubien to give and convey unto the said Charles Bent, the ancestor of said complainants, a certain undivided portion of said grant. That the said bill required the several defendants thereto to answer the same upon oath; that the said Beaubien and the said Miranda, each for himself answered the said bill upon oath and denied that the said agreement had ever been in fact made. That no proof was taken or produced in the said cause that such agreement had ever been made. That neither by the allegations of the said bill, nor by any proofs in the said cause does it appear that there was any valid consideration for the said pretended agreement, or that there had been any performance thereof, in whole or in part by the said Beaubien and Miranda, or either of them, or that any possession had been given to the said Charles Bent, or that the said Charles Bent, had entered upon the said lands or any part thereof or made any improvements thereon. But to the contrary thereof it appears in and by the said bill that the alleged consideration for the said pretended agreement was illegal, against public policy and wholly void in law or equity, and that any agreement founded thereon was and is void. That the said interlocutory decree was erroneous and not warranted by the pleadings or proofs, and should and would have been reversed upon appeal had the said decree ever been made final so that an appeal therefrom could have been taken.

53 This defendant further answering, says that after said interlocutory decree had been given, and before the commissioners appointed thereby, to make partition of the said lands had acted, or any further proceedings in said cause had been taken, an agreement by way of a compromise of the said suit was made by and between the parties thereto, settling and determining the equities thereof whereby the said Lucien B. Maxwell was to pay to the then complainants, the alleged heirs of the said Charles Bent, the sum of eighteen thousand dollars, in full settlement of all the claims and demands of the said heirs of said Charles Bent for any portion of the said grant, and as full payment for any right, title or interest therein, which they might have, and that in consideration

of the said sum of eighteen thousand dollars, the said claims, demands, rights and interests, if any they had, of the said heirs of said Charles Bent, including the said Estefana Hicklin and Teresina Schöarick, and the said Alfred Bent, and afterwards the said Guadalupe Bent and the said Charles, Juliano and Alberto Silas Bent as the heirs of the said Alfred Bent, were to be released, transferred and conveyed to the said Maxwell. That the said agreement and settlement was made upon the advice of the counsel for the said complainants in that said suit, and was in all material respects fully considered and approved by the said Alfred Bent, in his lifetime, although not formally concluded until after his death. That upon the suggestion of record of the death of the said Alfred Bent, his said minor children were made parties complainant and the said Guadalupe Bent was, at the April term, 1866, of the said district court upon motion of the counsel for said complainants duly appointed guardian *ad litem* for the said minor children of the said Alfred Bent, with full power to convey the interests of the said children in the said lands. That afterwards on or about the 3rd day of May, 1866, the said agreement and settlement was carried into effect, and the transfers of the said claims and alleged

54 interests of the said Teresina and Estefana, Guadalupe Bent, and the said minor children, Charles, Juliano and Alberto Silas Bent, were made to the said Maxwell by the execution and delivery of the said deeds, as in the bill mentioned, and the said Maxwell at the same time paid to the said then complainants, the said sum of eighteen thousand dollars, partly in cash, and partly in promissory notes, which were afterwards all duly paid, and that of the said amount the sum of six thousand dollars was duly paid to the said Guadalupe Bent.

That afterwards, as this defendant is advised, among other reasons, for the purpose of more fully carrying into effect the said agreement and settlement, upon the records of the court in which the said suit was pending, the said decree was made and entered at the September term, 1866, of said district court, vacating the said former interlocutory decree, and directing the said payments to be made and conveyances to be executed, which had in fact previously thereto been fully done. That the said compromise was considered and accepted by the said court in behalf of the said minors as advantageous to them, and that the said acts previously done pursuant to the said compromise were, and were assumed to be, and accepted as, sufficient compliance with the directions of said decree.

This defendant further answering says, that the price, so as aforesaid paid, by the said Maxwell in settlement for the claims of the said heirs of Alfred Bent, to wit: the sum of six thousand dollars, was at the time of said settlement and compromise, a fair and adequate price for an undivided one-twelfth part of said grant, with an undisputed title, and much more in proportion than other undisputed interests in said grant sold for at the same time and afterwards, and was an extremely liberal price, for the doubtful and uncertain equitable claim of the said Alfred Bent and his heirs.

And this defendant says that by the said agreement, so as
55 aforesaid made, by and between the said Maxwell and the
complainants in that said suit, all of the right, title and in-
terest, if any, of the said Charles Bent and of the said complainants
derived from the said Charles Bent, became and was transferred to
and vested in the said Lucien B. Maxwell, and the equitable right,
title and interest, if any, of the said complainants and each of them,
and all trusts if any, existing in their favor in the said premises,
and every part thereof, were and are wholly extinguished and ter-
minated.

This defendant further answering says that on or about the 1st
day of August, A. D. 1870, the said The Maxwell Land Grant and
Railway Company, and the said Lucien B. Maxwell and Luz B.
Maxwell, exhibited their bill of complaint in the district court for
the county of Colfax, Territory of New Mexico, against the said
Guadalupe Bent, now Thompson, and George W. Thompson, her
husband, and the said complainants, Charles, Juliano and Alberto
Silas Bent, praying among other things, that the trust in and by
the said interlocutory decree declared, be adjudged to be termi-
nated and extinguished; that all the said parties defendants, includ-
ing the said minors, by one George Boyles, their guardian *ad litem*,
answered the said bill, the said George Boyles, then an attorney of
said court, having been by the said court, appointed guardian *ad*
litem upon the petition of the said George W. Thompson, averring
that he was the stepfather of said children, and expressly praying
the appointment of said Boyles, as aforesaid; that proofs were taken
and heard thereon, and a decree rendered by the said district court,
whereby among other things it was decreed, that the said premises
be and were held by the said, The Maxwell Land Grant and Rail-
way Company, free and discharged of any and all trusts, right, title
and interest in or to the same, in favor of, or pertaining to the said Gua-
dalupe Thompson, either in her right, or as administratrix of the estate
of the said Alfred Bent, deceased, the said George Thompson, her hus-
band, the said Charles Bent, Alberto Silas Bent, Juliano Bent,
56 or any or either of them; that the said decree was upon ap-
peal to the supreme court of the Territory of New Mexico
affirmed; that on further appeal to the Supreme Court of the
United States the said decree was reversed, for the reason that the
said bill upon which the said decree was founded, was erroneously
framed as a bill of review, to reverse and annul the said decree of
September 1866 whereas it should have been framed as a bill to
carry the said decree more effectually into execution; that the said
Supreme Court, after deciding that the proofs in said cause show a
case which supports the conclusions of the said decree, nevertheless,
on account of the said errors in the frame of said bill, reversed the
same and remanded the same to the court below with directions to
allow the complainants therein to amend there bill, and with liberty
to the defendants therein to answer any new matter introduced
therein and that all the proofs in the said cause should stand as
proofs upon any future bearing thereof, with liberty to either party
to take additional proofs upon any new matter that might be put in

issue by the amended pleadings, all of which will more fully appear by the record of the said cause, and the decision and mandate of the said Supreme Court, to which this defendant craves leave to refer at the hearing as a part hereof; copies of which it prays leave hereafter to file.

That the said complainants therein have amended their said bill in conformity with the opinion of the said Supreme Court and that the defendants therein have answered the same, and the said cause is now set down for final hearing upon the said amended pleadings, and the proofs as they were formerly taken, without any additional proofs having been taken by either of said party. And this defendant avers, that in the said last-mentioned suit so as aforesaid pending, it was and is, in and by the answer of the several defendants thereto averred and insisted that the said decree of September 1866

57 was illegal and void as to the said minor children, and was and is denied that by the said proceedings in the said bill alleged, the said minor heirs of said Alfred Bent were in any manner divested of any title, either legal or equitable, they had at the time in said grant or tract of land, and was and is averred that the said deed of the said Guadalupe Thompson was illegal, void and inoperative, so far as the rights and interests of the said minors were concerned.

And this defendant is advised and insists, as it has hereinbefore insisted, that the said last-mentioned suit, so as aforesaid pending, involves all the matters and things in the bill herein set forth, with all the necessary and proper parties for the determination thereof, and that the same is and will be a bar to the prosecution of this suit.

And this defendant further answering says, that in the said suit, so as aforesaid pending in this court, although the said Guadalupe Bent, now Thompson, and the said George W. Thompson who now brings the bill of complaint herein, as the next friend of the said Alberto Silas and Julianio Bent, were parties defendant thereto, and fully answered the bill therein as aforesaid, and the said Charles, Alberto Silas, and Julianio Bent were duly represented therein by the said George Boyles, so upon the prayer of the said George W. Thompson appointed guardian *ad litem* for the said then minors, and although proofs were fully taken upon the issues therein; it was never at any time, either in the said answers or proofs, averred, alleged, claimed, insisted or suggested, that the said decree of September, 1866, or the said conveyance by the said Guadalupe Bent, had been procured to be given or made through fraud, misrepresentation, imposition or any of the said alleged improper practices in the bill herein mentioned. And this defendant is advised and so avers, that the said George W. Thompson and the said Guadalupe Thompson, at the time of making and filing their said answers in said suit, had and possessed the same knowledge and means of knowledge touching the said decree and deed, and the proceedings in connection therewith, as they have had, or could have had at any time subsequent thereto, and this defendant avers that with

58 reference to the said decree, deed and proceedings in connection

therewith, in the investigation of the title to the said grant and tract of land at the time of its purchase thereof as aforesaid, it had as means or source of information, other than the record of the said suit, and the pleadings and proofs therein, in which the validity of the said decree, deed and proceedings was in issue. And that from the said record, pleadings and proofs, or otherwise, it had and could have had, no notice or knowledge whatever of the said alleged frauds, misrepresentations and other improper practices in the bill herein alleged.

And this defendant further answering says that the said Frank R. Sherwin and Lucien Birdseye, in purchasing the said grant and tract of lands at the said master's sale, as aforesaid, acted merely as a purchasing committee for and on behalf of the holders of the said mortgage bonds of the said The Maxwell Land Grant and Railway Company, and for the purpose of transferring the said property to these defendants then being organized by the said bondholders, with a view of acquiring the said property upon said foreclosure sale; that as such purchasing committee the said Sherwin and Birdseye, at the time of that said purchase, duly paid to the said master in chancery, for the said grant, the sum of one million and sixty thousand dollars in the said mortgage bonds at par, and forty thousand dollars in cash, of the property of the said bondholders, and for and on behalf of this defendant corporation then being organized by said bondholders. That the said Sherwin and Birdseye thereafter, as they were in duty bound to do, transferred and conveyed the said property to this defendant.

And this defendant therefore avers and insists that it is a *bona fide* purchaser for a valuable consideration of all and singular the premises described in the said bill of complaint herein and
 59 in its title deeds aforesaid, without any notice or knowledge whatever of the said alleged wrongful or fraudulent transactions or combinations in the said bill set forth.

And this defendant denies all manner of unlawful combination in and by the said bill charged, without —, that any other matter or thing in the complainant's said bill contained, material or necessary for this defendant to make answer unto, and not herein well and sufficiently answered, confessed, traversed, avoided or denied, is true to the knowledge or belief of this defendant. All which matters and things this defendant is ready to aver and prove when and where this honorable court shall direct, and it prays to be hence dismissed with its costs in this behalf most wrongfully sustained.

THE MAXWELL LAND GRANT
COMPANY.

T. B. CATRON,
FRANK SPRINGER,

[SEAL.]

Solicitors for Defendant.

And afterwards, to wit, on the 24th day of October, 1884, there was filed in said clerk's office, the joint and several answer of defendants, which answer is in words and figures as follows, to wit:

Joint and Several Answer of Defendants.

No. 435.

TERRITORY OF NEW MEXICO, {
County of Colfax. }

In the District Court for the First Judicial District, Sitting within
and for the County of Colfax. In Chancery.

CHARLES BENT *et al.*

vs.

THE MAXWELL LAND GRANT AND RAILWAY CO. *et al.* }

The joint and several answer of The Maxwell Land Grant and Rail-
way Company, Guadalupe Miranda, Jesus G. Abreu, sur-
viving executor of the last will of Charles Beaubien; Luz
B. Maxwell, Petra Abreu and Jesus G. Abreu, her hus-
band; Juana Clouthier and Joseph Clouthier, her husband;
Pablo Beaubien, Virginia Keyes and — Keyes, her husband;
Peter Maxwell, Amelia Abreu and — Abreu, her husband;
Estefana Hicklin, Sophia Jaramillo, Benigna Mares and Vicente
Mares, her husband; Teresina Scheurick and Aloys Scheurick,
her husband, to the bill of complaint of Charles Bent, Julianio
Bent, and Alberto Silas Bent, complainants.

These defendants, saving and reserving all manner of benefit and
advantage to themselves of exception to the many errors and insuffi-
ciencies in the said bill of complaint contained, for answer thereto,
or to such parts thereof as these defendants are advised is material
for them to make answer unto, answer and say:

They admit the grant of land to Charles Beaubien and Guada-
lupe Miranda, and the confirmation thereof by Congress, as stated
in the bill; they admit the suit brought about the 12th day of
September, 1859, by Alfred Bent and others against Guadalupe
Miranda and others, and the proceedings had therein, and the decree
rendered therein on or about the 3rd day of June, 1865, of the pur-
port stated in the bill; they deny that by said decree the undivided
fourth part of said grant of land was established and confirmed to
the said Albert, Estefana and Teresina Bent; they admit the con-
veyances by the said Miranda and the heirs of the said Beaubien to
said Maxwell as stated; they admit the death of Charles Bent and
that his children Charles, Julianio and Alberto Silas Bent were made
parties complainant in the said suit, but deny that the said Alfred
died intestate, or that the said children were his sole heirs-at-law.
They admit that the said Guadalupe was appointed guardian
ad litem of the said children in said suit, but deny that it was with
the powers as stated in the bill; they admit the decree rendered at
the September term, 1866, of said district court in and for the
county of Taos; they admit the conveyances by the said Aloys
Scheurick and Teresina, his wife, and the said Alexander

Hicklin and Estefana, his wife, and the said Guadalupe Bent, to the said Maxwell as stated.

Defendants deny that said Guadalupe is a Mexican woman, or ignorant as stated in the bill; they admit that she was wont to consult with said Scheurick, and that she reposed special truse and confidence in him; they deny that said Maxwell was a man of great power and influence as stated, or that he caused or procured the said Guadalupe to be appointed guardian *ad litem* as stated, or the said conveyances to be prepared as stated, or caused or procured the said Aloys Scheurick to believe or represent, or that the said Scheurick did represent, to the said Guadalupe Bent any of the matters in the bill charged in that behalf; they deny that the said Guadalupe executed the said conveyance moved and induced by the representations in said bill stated, or that the said conveyance was not interpreted or explained to her, or executed without the advice of counsel, or that the said Guadalupe was at the time ignorant of the character or extent of said grant, or the value thereof, or of the rights and shares of complainants.

Defendants deny that neither then nor at any time afterward, did the said Maxwell pay to the said Guadalupe Bent the said sum of six thousand dollars; they deny that neither the said Guadalupe Bent, nor the counsel or solicitor of the said Guadalupe, nor any other person authorized to agree or consent for complainants, did in fact agree or consent as in said last-mentioned decree is recited; nor to the vacating or setting aside of said first-recited decree; or that such consent, if given, was obtained by the importunity or fraudulent or false representations of said Scheurick as stated, or that the said Scheurick or other person or persons, by procurement of the said Maxwell caused it to be falsely represented to the said district court as in the bill stated, or that the said district court, by reason of such alleged false representations or without inquiry or judicial examination as stated, gave and entered the said decree.

Defendants on advice of counsel deny that the said decree entered at the September term, A. D. 1866, or the before-mentioned conveyance of the said Guadalupe Bent to the said Lucien B. Maxwell, were, or are, void as against complainants.

Defendants deny that the said grant contains two millions of acres or thereabouts, or that the interest or share of complainants therein at the time of the entering of the said decree at the September term, 1866, was reasonably worth the sum of one hundred thousand dollars, or any sum whatever; they deny that the said Alfred Bent left a considerable estate in houses and lands, and in moneys and personal property, or that the said Guadalupe out of the said estate was then or always afterwards able to support and educate complainants, as stated in the bill, or that the said or any facts as stated in said bill, concealed from said district court at the time of the entry of the said decree at the September term, 1866.

Defendants upon advice of counsel, deny that the decree aforesaid, entered at the September term, 1866, of said district court, directing conveyance by the said Guadalupe Bent as guardian *ad litem* of

said complainants to the said Lucien B. Maxwell, and vacating and setting aside the former decree of said district court, is erroneous in any of the particulars in the bill set forth.

Defendants admit that the said The Maxwell Land Grant and Railway Company and the said Lucien B. Maxwell and Luz B. Maxwell about the year 1870 exhibited in the district court in and for said county of Colfax, in the Territory of New Mexico, their bill of complaint against complainants and the said Guadalupe Thompson, and George W. Thompson, her husband, as stated in the bill,

63 and that various proceedings were had in said cause as stated, and they aver that the said cause is still pending, and insist that the pendency of the said cause is a bar to the prosecution of this cause.

Defendants admit the conveyances by said Maxwell to said Maxwell Land Grant and Railway Company as stated, but deny that the said Maxwell Land Grant and Railway Company derived great or any gains or profits from the said grant as stated, or that any part thereof is payable to complainants.

And these defendants deny all manner of unlawful combination in and by the said bill charged without this, that any other matter or thing in the complainants' said bill contained, material or necessary for these defendants to make answer unto and not herein well and sufficiently answered, confessed, traversed, avoided or denied, is true to the knowledge or belief of these defendants. All of which matters and things these defendants are ready to aver, maintain and prove as this honorable court shall direct, and pray to be hence dismissed with their costs in this behalf most wrongfully sustained.

T. B. CATRON,
FRANK SPRINGER,
Solicitors for Defendants.

And afterwards, to wit, on the 26th day of November, 1884, there was filed in said clerk's office the following replication, which replication is in words and figures as follows, to wit:

Replication.

No. 435.

TERRITORY OF NEW MEXICO, }
 County of Colfax. }

In the District Court for the First Judicial District, Sitting within
 and for the County of Colfax. In Chancery.

CHAS. BENT *et al.*

vs.

THE MAXWELL LAND GRANT AND RAILWAY CO. *et al.* }

64 The replication of Charles Bent, Juliano Bent, and Alberto Silas Bent, complainants, to the several answer of the Maxwell Land Grant Company and the joint and several answers of the Maxwell Land Grant and Railway Company, Guadalupe Miranda, Jesus G. Abreu, surviving executors of the last will of Charles Beaubien; Luz B. Maxwell, Petra Abreu and Jesus G. Abreu, her husband; Juana Clouthier and Joseph Clouthier, Pablo Beaubien, Virginia Keyes and — Keyes, her husband; Peter Maxwell, Amelia Abreu and — Abreu, her husband; Estefana Hicklin, Sophia Jaramillo, Benigna Mares and Vicente Mares, her husband; Teresina Scheurick and Aloys Scheurick, her husband.

These repliants saving unto themselves all advantage of exception to the manifold insufficiencies of the said answers, by way of replication thereto saith: That the original bill of these complainants exhibited in this court, against the said defendants, and the matters therein contained, are true, certain and sufficient in law to be answered unto by the said defendants, and the answers of the said defendants are untrue, uncertain and insufficient to be replied unto by *this* repliant, without this, that any other matter or thing in said answers or either thereof contained material in law to be replied unto, confessed, avoided, traversed or denied, is true, all of which matters and things there repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have prayed.

CALDWELL YEAMAN,
 WELLS, SMITH & MACON,
Solicitors for Complainants.

65 And afterwards, to wit: on the 21st day of January, A. D. 1885, there was filed and entered of record in the said clerk's office, the following decree *pro confesso*, which said decree *pro confesso* is in words and figures as follows, to wit:

66

Decree pro Confesso.

No. 435.

TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court, County of Colfax. In Vacation.

CHARLES BENT *et al.* }
vs. } Chancery.
 GUADALUPE MIRANDA *et al.* }

On reading and filing the certificate of the clerk and register of this court to the effect that no appearance has been entered in this cause by or for said defendants, the unknown heirs of Joseph Pley, unknown heirs of Leonora Trujillo and Guadalupe Thompson, and after hearing Caldwell Yeaman, Esquire, of counsel for said complainants, it is ordered, adjudged and decreed by the court that the bill of complaint herein be, and the same hereby is taken as true and confessed by the said defendants, the unknown heirs of Joseph Pley, unknown heirs of Leonora Trujillo and Guadalupe Thompson.

S. B. AXTELL,
Chief Justice, etc.

67 And afterwards, to wit: on the 14th day of May, 1892, there was filed in said clerk's office the following stipulation, which stipulation is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court for the Fourth Judicial District.

68 THE MAXWELL LAND GRANT AND RAILWAY }
 Co. *et al.*, Complainants, } In Chancery.
vs. } No. 356.
 GUADALUPE THOMPSON *et al.*, Defendants. }

CHARLES BENT *et al.*, Complainants, }
vs. } In Chancery.
 THE MAXWELL LAND GRANT AND RAILWAY Co. } No. 435.
et al., Defendants. }

It is hereby stipulated between and by the counsel therein that the above-entitled causes, numbered respectively Nos. 356 and 435, may be heard and determined together upon the proofs now on file in either of said causes; and that all proofs filed in either cause may be considered as if duly taken and introduced in both causes; that the transcript of the record in said cause No. 356 as filed in the supreme court of the Territory of New Mexico for the hearing

upon appeal at the January term, A. D. 1885, and as corrected by the stipulation filed October 22, 1884, may be considered as containing the pleadings, proofs, and matters of record in said cause up to the date when said transcript was made, and may be used and considered in both of said causes as above stated.

This stipulation shall apply as well to the hearing of said causes in the district court as to any hearing that may be had upon appeal of either of said causes.

Dated Las Vegas, April 30th, 1892.

(Signed)

FRANK SPRINGER,
Solicitors for Complainants in No. 356 and
Defendants in No. 435.

69 (Signed)

WELLS, McNEAL & TAYLOR,
CALDWELL YEAMAN,
Solicitors for Defendants in No. 356 and
Complainants in No. 435.

And afterwards, to wit: on the 8th day of May, A. D. 1893, there was filed and entered of record in said clerk's office the following order of court dismissing said cause at complainants' costs, which said order is in words and figures as follows, to wit:

In the District Court for the Fourth Judicial District in and for the County of Colfax.

CHARLES BENT, JULIANO BENT and ALBERT
SILAS BENT, *et al.*

vs.

THE MAXWELL LAND GRANT AND RAILWAY
COMPANY, GUADALUPE MIRANDA, *et al.*

} Chancery. No. 435.

This cause coming on to be heard upon the plaintiffs' exhibits and proofs on file herein, and the stipulation on file signed by the solicitors of the respective parties, dated the 30th day of April, A. D. 1892, and full argument having been at a former day made therein by Mr. Caldwell Yeaman and A. T. McNeal, counsel for complainants, and Mr. Frank Springer, of counsel for defendants, and due deliberation having been had thereupon, the court finds the equities of said cause to be with the defendants.

It is therefore considered, ordered and adjudged that the bill of complaint in this cause be and the same hereby is dismissed, and that said complainants pay the costs of this suit to be taxed.

70 Dated Las Vegas, New Mexico, May 8th, A. D. 1893.

(Signed)

JAMES O'BRIEN,
Chief Justice, etc.

71 Now, to wit, on the 1st day of May, A. D. 1894, the above application in the above-named cause having been presented to the court, after hearing the said solicitors, Caldwell Yeaman and R. T. McNeal, on behalf of the complainants it is hereby ordered and decreed that the complainants in said cause, Charles Bent, Juliano

Bent, Alberto Silas Bent, and all the complainants named in the bill and proceedings in the said chancery cause numbered 435, be and they are hereby allowed to appeal from the decree rendered in said cause, and entered therein on the 8th day of May, A. D. 1893, and to appeal the said cause from the said district court to the supreme court of the Territory of New Mexico; and it is further ordered that citation issue to all the defendants in the said cause as in the said application asked for.

Dated Las Vegas, New Mexico, May 1st, A. D. 1894.

THOMAS SMITH,

Chief Justice, etc.

72 And afterwards, to wit, on July 29, 1895, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an assignment of errors in said cause; which said assignment was and is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, 1895.

CHARLES BENT, JULIANO BENT, ALBERTO
SILAS BENT, Appellants,

vs.

THE MAXWELL LAND GRANT AND RAIL-
way Company, Guadalupe Miranda,
Jesus G. Abreu, as Executor of the
Last Will of Charles Beaubien; Luz B.
Maxwell, Petra Abreu, Jesus G. Abreu,
Her Husband; Juana Clothier and
Joseph Clothier, Her Husband; Pablo
Beaubien, Virginia Keyes and —
Keyes, Her Husband; Peter Maxwell,
Amelia Abreu and — Abreu, Her
Husband; Sophia Jaramillo, Pablito
Maxwell, Odila Maxwell, Benigna
Mares and Vicente Mares, Her Hus-
band; The Unknown Heirs of Joseph
Pley, Deceased; Estefana Hicklin,
Teresina Scheurich, Aloys Scheurich,
Her Husband; Guadalupe Thompson,
The Maxwell Land Grant & Railway
Company, The Unknown Heirs of Leo-
nora Trujillo and of Frederick Miller
and Theodora Miller, His Wife; Cyrus
W. McCormick, and James M. Miller,
Appellees.

No. 579. Appeal from
Fourth District Court,
Colfax County.

Assignment of Errors.

And the said appellants, by Caldwell Yeaman and Wells, Mc-
Neal & Taylor, their attorneys, come now and say that in the record

and proceedings of said district court and the decree given in the said district court manifest error hath intervened in this, to wit:

That by the record and proceeding- of the said district court it doth appear that the said district court by its final decree
73 herein dismissed the bill of complaint of the said appellants out of the said district court and decreed that the said appellants should pay the costs of their said suit, whereas by the law of the land decree ought to have been given in the said district court in favor of the said appellants and according to the prayer of the bill of complaint herein.

Wherefore, for the errors aforesaid and the manifold other error in the said record and decree appearing, appellants pray that the decree of the said district court may be reversed, annulled, and altogether held for naught, and they also pray judgment for their costs.

CALDWELL YEAMAN,
WELLS, McNEAL & TAYLOR,
Attorneys for Appellants.

And afterwards, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on the last Monday in July, 1895, on the thirtieth day of said term, the same being Wednesday, October 9, 1895, the following, among other, proceedings were had, to wit:

CHARLES BENT <i>et al.</i> , Appellants,	} 579. Appeal from Colfax County.
<i>vs.</i>	
GUADALUPE MIRANDA <i>et al.</i>	

This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, the court, being now fully advised in the premises, announces its decision by Associate Justice Collier affirming the decree of the court below, Associate Justices Laughlin, Hamilton, and Bantz concurring. It is therefore ordered, adjudged, and decreed by the court that the decree of the district court in and for the county of Colfax, whence this cause came into this court, be, and the same hereby is, affirmed, and that this cause be, and the same hereby is, remanded to said district court, with directions to carry into effect said decree dismissing said bill of complaint; and it is further ordered, adjudged, and decreed by the court that said appellants pay all costs in this behalf expended, to be taxed, and that execution issue therefor.

And afterwards, at the term of said supreme court last aforesaid, on the thirty-fifth day thereof, the same being Tuesday, October 15, 1895, the following, among other, proceedings were had, to wit:

73½ CHARLES BENT *et al.*, Appellants, } 579. Appeal from
vs. District Court of
 GUADALUPE MIRANDA *et al.*, Appellees. } Colfax County.

Now come the said appellees, by their solicitor, Frank Springer, Esq., and the said appellants come by their solicitor, R. T. McNeal, Esq., and said appellants pray an appeal from the judgment and decree of this court in this cause to the Supreme Court of the United States, and the court, being sufficiently advised in the premises, grants said motion. It is therefore considered and adjudged by the court that said appellants be, and they hereby are, allowed an appeal from the judgment and decree of this court in this cause to the Supreme Court of the United States; and it is further ordered by the court that said appellants enter into a good and sufficient bond to appellees in the sum of five hundred dollars, with sureties to be approved by the clerk of this court, conditioned for the payment of all costs in connection with this appeal; and thereupon the court makes and certifies a statement of the facts herein for the purpose of such appeal and orders that the same be made a part of the record in this cause.

And afterwards, to wit, on the 15th day of October, 1895, there *was* filed in the office of the clerk of said supreme court the findings of fact made and certified by the court in said cause; which said findings of fact are in the words and figures following, to wit:

74 In the Supreme Court of the Territory of New Mexico, July Term, 1895.

CHARLES BENT *et al.*, Appellants, }
vs. } No. 579.
 GUADALUPE MIRANDA *et al.*, Appellees.

THE MAXWELL LAND GRANT AND RAILWAY COMPANY }
et al., Appellees, } No. 581.
vs. }
 GUADALUPE THOMPSON *et al.*, Appellants.

Now, on this day, come the appellants, by their counsel, and move the court to make and certify a statement and finding of the facts for the purpose of an appeal to the Supreme Court of the United States, and thereupon the court grants said motion.

And the court now, being sufficiently advised and pursuant to the statute in such cases made and provided, does make and certify the following as a statement and finding of the facts proven and established by the evidence in each of the above-entitled causes, to wit:

In the year 1841 a grant of land was made by the Mexican government to Charles Beaubien and Guadalupe Miranda of a tract of land situate in the present Territory of New Mexico and which afterwards came to be and now is commonly known as the Maxwell

grant. They were placed in possession of it in 1843. The grant was confirmed by act of Congress approved June 21st, 1860. In September, 1859, Alfred Bent and his two sisters, Estefana, 75 wife of Alexander Hicklin, and Teresina, who soon after became the wife of Aloys Sheurich, set up a claim to one-third undivided interest in the said grant in the right of their father, Charles Bent, who had died in 1847. They began an action in chancery in the district court of the Territory of New Mexico in and for the county of Taos against Beaubien, Miranda, L. B. Maxwell, and Joseph Pley, by filing their original bill September 12th, 1859, in words and figures following :

UNITED STATES OF AMERICA, }
Territory of New Mexico, County of Taos, } ss.:

In the United States District Court for the 2nd Judicial District of the Territory of New Mexico, September and October Term, A. D. 1859.

To the Honorable William G. Blackwood, presiding judge of said district court, in chancery sitting :

Humbly complaining, show unto your honor, your orator and oratrixes, Alfred Bent, Estefana Hicklin, and her husband Alexander Hicklins, and Teresa Bent, a minor, by her next friend, Ceran St. Vrain, of the county of Taos, Territory of New Mexico, that Charles Bent, of the county of Taos, deceased, the late father of your orator and oratrixes, Alfred Bent, Estefana Hicklin and Teresa 76 Bent, was in *her* lifetime the owner in right and equity, of the undivided one-third part of a certain "merced" or grant of lands made by the Mexican government, in or about the year 1843, in due form of law, to Guadalupe Miranda and Charles Beaubien, which said grant or "merced" of lands is situated, lying and being in the said county of Taos, on the rivers known as the Rayado, Ponie Vermejo, Cimarron Cito and Colorado, and known as the "Rayado grant;" and the said deceased being entitled to be seized as owner of the one undivided third part of the lands aforesaid, did depart this life the year 1844, leaving your orator and oratrixes coheirs and heiresses him surviving; and upon his death the said one undivided third part of said lands should have descended upon and should have come to your orator and oratrixes, the said Alfred Bent, Estefana Hicklin and Teresina Bent; and your orator and oratrixes further show unto your honor that though the name of our late deceased father, Charles Bent, does not appear as one of the grantees of the said "merced," yet it is a fact of common notoriety that the said grant was obtained from the late Mexican government mainly by his exertion, influence and instrumentality, and that the said Miranda and Beaubien, the grantees named in the documents of the grant or "merced" from the said Mexican government aforesaid, have never denied, but have confessed and acknowledged in the presence of numerous persons, that our father, and late Charles Bent, deceased, had equal right with the said — —

was fully and entirely with themselves equal owners in his lifetime of the one undivided third part of the said grant of land, and that such was the verbal understanding in all good faith between our deceased father and said grantees; and further your

77 orator and oratrixes show unto your honor that since the death of their late father, Charles Bent, they, the said grantees of the said tract of land granted as aforesaid, have confessed and acknowledged, in the presence of witnesses, the fact notoriously known that your orator and oratrixes, as the coheirs and heiresses of the said Charles Bent, deceased, are entitled to the one undivided third part, all of which your orator and oratrixes is prepared to verify by sufficient and competent testimony.

And your orator and oratrixes further show unto your honor that they have frequently applied to and requested the said Guadalupe Miranda and Charles Beaubien to join and concur with your orator and oratrixes in making a fair, just and equal partition of the said premises between them, the said defendants, Guadalupe Miranda and Charles Meaubien and others now holding under the same and wrongfully and to the injury of your orators and oratrixes, occupying to their own exclusive use the said lands hereinbefore described, that there should be a just and equitable division of one-third of said property to each the said Guadalupe Miranda and to the said Charles Beaubien and their respective assigns, and the other third to your orator and oratrixes to be allot-ed, held and enjoyed jointly by them. And your orator and oratrixes well hoped that the said Guadalupe Miranda and Charles Beaucien and their assigns would have complied with such, their reasonable request as in justice and equity it ought to have been.

But now so it is, may it please your honor, that the said Guadalupe Miranda and Charles Beaubien, combining and confederating to and with Lucien B. Maxwell, Joseph Pley, and with divers other

78 persons, at present unknown to your orators and oratrixes, whose names when discovered your orators and oratrixes pray they may be at liberty to insert herein with apt words

to charge them as parties defendants hereto, as are hereby charged; the said Guadalupe Miranda, Charles Beaubien, Lucien B. Maxwell and Joseph Pley, and as contriving how to wrong and injure your orators and oratrixes in the premises. They, the said Guadalupe Miranda, Charles Beaubien and others herein made defendants, absolutely refuse to comply with such request, and they the said defendants at times pretended that your orators and oratrixes have no right to said one undivided third of said property or offer them with interest to defraud and wrong your orators and oratrixes, such parts of said grant of lands as they are comparatively valueless, in comparison to those parts of said lands now occupied and used for the sole behoof and benefit of the said defendants, regardless of the first rights of your orators and oratrixes. And as whereas your orators and oratrixes charge, and so the truth is, that a fair and just partition for said grant of land, according to the intent thereof, and according to equity, right and good conscience, will tend greatly to the benefit and advantage of your orators and oratrixes as well

as them, the said defendants, in defining what the rights of all the parties hereto actually are, but they the said defendants under divers, frivolous pretenses, absolutely refuse to join or concur with our orators and oratrixes therein.

All which actions, doings, pretenses and refusals are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator and oratrixes in the premises.

79 In consideration whereof, and forasmuch as your orator- and oratrixes can only have adequate relief in the premises in a court of equity, where matters of this nature are properly cognizable and relievable. To the end therefore that the said Guadalupe Miranda, Charles Beaubien, Lucien B. Maxwell and Joseph Pley, and other persons now unknown, when discovered, their confederates when discovered, may, upon their several and respective corporal oaths, to the best and utmost of their several and respective knowledge, remembrance; information and belief, true, direct and perfect answers make to all and singular the matters aforesaid; and that as fully and perfectly as — the same were here repeated, and they and every of them distinctly interrogated thereto, and more especially that the said confederates may, in manner aforesaid; answer and set forth whether the said orators and oratrixes have not a full and equitable one-third part or share — may be allotted and conveyed unto your orators and oratrixes, Alfred Bent, Estefana Hicklin and her husband, Alexander Hicklin, and Teresina Bent, a minor in charge to her first friend, Ceran St. Vrain, and their heirs and assigns.

That one other full and equitable third part or share may be allotted and conveyed to the said Guadalupe Miranda, his heirs and assigns, and a like equal one-third part to the said Charles Beaubien, his heirs and assigns, who are the defendants in this suit, and that your orators and oratrixes, Alfred Bent, Estefana Hicklin and her husband, Alexander Hicklin, and Teresa Bent, a minor, by her first friend, Ceran St. Vrain, may hold and enjoy their said joint allotment of one equal and full third part of

80 said premises according to the nature thereof, jointly, and that all proper and necessary conveyances and assurances may be executed for carrying such partition into effect, and that your orators and oratrixes may have such further or other relief in the premises as the nature of the circumstances of this case may require, and to your honor shall seem meet. And may it please your honor to grant to your orator- and oratrixes a writ of subpoena, to be directed to the said Guadalupe Miranda, a resident of Donna Ana county, Charles Beaubien, Lucien B. Maxwell and Joseph Pley, residents of the county of Taos, thereby commanding them on a certain day and under a certain pain therein to be limited, personally, to be and appear before your honorable court, and then and there full, true, direct and perfect answers make to all and singular the premises; and further to stand to, perform and abide such further order, direction and decree therein as to your honor shall seem meet and your orator- and oratrixes shall ever pray, etc.

SMITH & HOUGHTON, *Solicitors.*

The affiant, Alfred Bent, one of the complainants in the foregoing bill, on his oath, declares that the matters and things therein set forth, so far as they come within his own knowledge, are true; and that so far as he has been informed of the same by others, he believes them to be true.

ALFRED BENT.

Sworn and subscribed to before me this twelfth day of September, A. D. 1859.

[SEAL.]

JAMES BARRY, *Clerk*.

81 A general demurrer to this bill was interposed and over-ruled April 12th, 1860.

Afterwards, on May 8th, 1860, said complainants filed their amended bill as follows:

TERRITORY OF NEW MEXICO, }
Second Judicial District, County of Taos. }

District Court, April Term, 1860.

The amended bill of complaint of Alfred Bent, Estafana Hicklin, wife of Alexander Hicklin, and Alexander Hicklin, her husband, and Teresina Bent, by Ceran St. Brain, her next friend, all of the county and district aforesaid, against Charles Beaubien, a resident of said county of Taos, and Lucien B. Maxwell and Jose Pley, of the county of Mora, in said district, and Guadalupe Miranda, a resident of the county of Donna Ana, in the Territory aforesaid.

To the Honorable William G. Blackwood, presiding judge of said district court in chancery sitting:

Humbly complaining, your petitioners, Alfred Bent, Estafana Hicklin and Teresina Bent, by her next friend, Ceran St. Vrain and Alexander Hicklin, the husband of Estafana Hicklin, sheweth unto your honor that in or about the year A. D. one thousand eight hundred and forty-three, Guadalupe Miranda and Charles Beaubien, who are prayed to be made parties defendants to this bill of complaint, desired to obtain a grant of lands from the Mexican government, and applied to one Charles Bent, the natural father of your petitioners, Alfred Bent, Estefana Hicklin and Teresina Bent, for his aid and assistance and influence in obtaining for them said grant of lands, agreeing with the said Charles Bent that if the said Charles Bent would lend his aid, assistance and labor in and about the procuring said grant of lands from the Mexican govern-
82 ment, that they, the said Beaubien and Miranda would, in consideration thereof, give to him, the said Charles Bent, one undivided third interest in said lands when so obtained.

Your petitioners would further show unto your honor that, at the solicitation of the said Beaubien and Miranda, that said Charles

Bent did, in consideration of the proposition so made by the said defendants to him, lend his services, influence and means in and about the prosecuting the application of the said Beaubien and Miranda for a grant of lands from the Mexican government, and by the labor, services, means and influence of him, the said Charles Bent did, about the year aforesaid, to wit, 1843, obtained from the Mexican government a grant or merced of lands in due form of law, granting to the said Beaubien and Miranda a certain district of country situated in the district aforesaid and commonly called and known as the Rayado grant, a copy of which grant is hereto annexed, marked Exhibit "A," and prayed to be taken as a part of this bill, with leave to refer thereto as often as may be necessary.

Your petitioners would further show unto your honor that after said grant or merced was obtained, and the said Beaubien and Miranda were placed in possession thereof, they, the said Beaubien and Miranda, acknowledged the great services rendered them by the said Charles Bent, and also that the said Charles Bent had an equal interest in said grant of lands with themselves.

Your petitioners further show unto your honor that in the year A. D. one thousand eight hundred and forty-seven, the said Charles Bent departed this life leaving no legitimate descendants of his body, but leaving your petitioners, Alfred Bent, Estefana
83 Bent, who afterwards intermarried with Alexander Hicklin, and Teresina Bent, his natural children and heirs to his estate, and left no other heirs descendants of his body.

Your petitioners further show unto your honor that after the decease of the said Charles Bent, the said Beaubien and Miranda, contriving to deceive and defraud your petitioners of their rights as heirs-at-law of the said Charles Bent, and well knowing that your petitioners, Alfred Bent, Estefana Hicklin and Teresina Bent were the only rightful heirs to the interest of said Charles Bent, deceased, and well knowing that the said Charles Bent at the time of his death was rightfully entitled to an interest of one undivided third part of said grant or merced of lands when applied to by your petitioners as the legal heirs and descendants of said Charles Bent, to make an equitable division of said lands between them, the said Beaubien and Miranda, and your petitioners as the heirs of the said Charles Bent, deceased, each taking share and share alike; that is to say, the said Beaubien the one undivided third part, the said Miranda the one undivided third part, and your petitioners, Alfred Bent, Estefana Hicklin and Teresina Bent, one undivided third part among them as the heirs-at-law of said Chas. Bent, deceased, offered your petitioners such part of said grant only as to them were valueless, and comparatively so to your petitioners. The said Beaubien and Miranda still holding out inducements to your petitioners that they would make a fair and equitable division of said grant with them in accordance with the agreement made with the said Charles Bent deceased.

But so it is, may it please your honor, that as often as your petitioners have applied to the said Beaubien and Miranda for a fair and equitable division of said lands, they have acknowledge the

84 rights of your petitioners, but contriving to defraud your petitioners in the premises, have repeated to them the same offers, hoping thereby to induce your petitioners not to assert their rights in a court of equity.

Your petitioners further show that the said Bea-bien and Miranda, not regarding their obligation to the said Charles Bent, deceased, nor the right of your petitioners as the *one* heir- of said Bent, have sold to one Lucien B. Maxwell and Jose Pley, large tracts of land within the boundaries of said grant, who have taken possession thereof, and are now in the enjoyment of the same, regardless of the rights and interests of your petitioners, the said Lucien B. Maxwell and one Jose Pley are now combining and confederating with the said Beaubien and Miranda to defraud and cheat your petitioners out of their just right, and interests in said grant or merced of land.

Your petitioners therefore pray that the said Lucien B. Maxwell and Jose Pley may be made parties defendant to this their bill of complaint.

And now may it please your honor, that since your petitioners are not willing to accept from said Beaubien and Miranda, such parts of said grant of land as they are willing to give them in satisfaction of their interest as heirs of law of the said Charles Bent, deceased, wholly and entirely refuse to make any partition of said lands with your petitioners, all of which pretences and refusals are contrary to equity and good conscience, and tending to the manifest wrong and injury of your petitioners in the premises.

In consideration whereof, and forasmuch as your petitioners can have adequate relief in a court of equity only; therefore that the said Charles Beaubien Guadalupe Miranda, Lucien B. Maxwell and Jose Pley and all other persons, their confederates when discovered, may upon their respective corporal oaths, full, true and correct answers make unto all and singular the allegations in this bills contained, and upon the premises being found true, and that

85 your petitioners are justly entitled to one undivided third part of said grant, that an account may be taken of all the rents and profits of said lands under the direction of this honorable court, and that a just and equitable partition of all the lands in said grant or merced, be made between the parties interested therein, and that your honor appoint a commissioner to convey the one undivided third part of said lands to which your petitioners may be entitled as well in value and interest as in quantity to them. And that this honorable court may decree to your petitioners according to their respective rights, their said portion or interest in and to said grant or merced, and to their heirs in fee-simple forever, and that your honor will grant such other and further relief as in equity and in good conscience your petitioners may be entitled to, and your petitioners will ever pray, etc.

ASHURST & TOMPKINS,

Solicitors for Complainants.

86 After demurrers had been interposed and overruled the defendants answered the bill. Miranda's answer was made May 15th, 1860, as follows:

And be it further remembered, that with the papers filed in this cause, as found, the following paper, purporting to be an answer of the defendant, Guadalupe Miranda, to the bill of complaint herein, which answer is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Taos. }

In the District Court, September Term, A. D. 1860.

ALFRED BENT *et al.*, Heirs of Charles Bent, } Bill in Chancery for
vs. } Partition, etc.
CHARLES BEAUBIEN *et al.*

The answer and disclaimer of Guadalupe Miranda, one of the defendants, to the bill of complaint of Alfred Bent and others against Charles Beaubien, Guadalupe Miranda, and others.

87 This defendant saving and reserving to himself, now and at all times hereafter, all manner of advantage and benefit of exception, and otherwise that can or may be had and taken to the many untruths, uncertainties, and imperfections in the said complainants' bill of complaint contained for answer thereto, or unto so much or such part thereof as is material for this defendant to make answer unto, he answers and says that it is true, as charged in plaintiffs' bill, that the sitio of land as described in plaintiffs' bill was granted unto the said Beaubien and himself, as therein alleged, and knows that said Beaubien expressed a desire to invite Charles Bent, deceased, to participate in said grant, or sitio, but knows of no further interest or connection which the said Bent ever had in and to said grant and sitio.

This respondent further saith that he hath heretofore for a consideration, greatly under the value of his original and real interest in and to said grant or sitio sold and transferred by a quitclaim deed, all of his said right, title and interest to Lucien B. Maxwell, one of the defendants in said bill, and therefore saith that he doth fully and absolutely disclaim all manner of right, title and interest, whatsoever in and to said grant or sitio in said bill described and in and to every part thereof, and this respondent doth deny all and all manner of unlawful and fraudulent combination and confederacy, unjustly charged against him in and by the said bill of complaint without that any other matter or thing in said bill contained material or necessary for this defendant to make answer unto and not herein well and sufficiently answered unto, confessed or avoided, traversed and denied, is true, all which matters and things

88 this respondent is ready to aver, maintain, and prove as this honorable court shall award, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

S. M. BAIRD,
Attorney for the Defendant Miranda.

Guadalupe Miranda maketh oath and saith that the matters and things in the foregoing answer are true.

GUADALUPE MIRANDA.

Sworn to and subscribed before me this — day of March, A. D. 1860.

Sworn to and subscribed before me this 15th day of May, 1860.

SAMUEL ELLISON, *Clerk*.

89 Beaubien's answer was made September 6th, 1860, as follows:

Copy of Answer of Charles Beaubien to Foregoing Bill.

UNITED STATES OF AMERICA, }
Territory of New Mexico, County of Taos, }⁸⁸:

In the District Court for the Second Judicial District in said Territory Held for said County, at September Term, A. D. 1860.

90 ALFRED BENT and Others }
vs. } Chancery.
CHARLES BEAUBIEN and Others. }

And the said Charles Beaubien, saving and reserving to himself all and all manner of exception to the manifold errors, imperfections and uncertainties in the plaintiffs' bill contained for answer thereto, or so much thereof as he is advised, it is sufficient for him to answer, answering, says, that it is true as stated in said petition that the tract of land therein described was granted to said Beaubien and Miranda by the Mexican government at the time mentioned in said bill of complaint, but it is not true that it was obtained by means of the influence of said Charles Bent, nor did he or said Miranda, to his knowledge, ever solicit or apply to said Charles Bent for the use of his influence for the purpose of obtaining the grant aforesaid nor did the said Charles Beaubien or Guadalupe Miranda ever offer to said Charles Bent to give him any portion of said land so granted, in consideration of the aid or influence of said Charles Bent in obtaining the said grant. That the said grant was obtained chiefly by means of the influence of said Miranda, then secretary of the Territory and residing at Santa Fé, a Mexican of intelligence and wealth, and at that time on terms of great friendship and confidence with the Mexican government of the Territory, and also as this respondent believes for the reasons set forth in the petition and stated by the governor in making the donation, as by reference to exhibits filed with plaintiffs' bill will more fully appear; whereas the said Charles Bent was then and up to the time of his death, a citizen of the United States and resided far from the capital, with few opportunities for intercourse with said Mexican government. That at this time a very warm and cordial friendship existed between the said Charles Bent and this respondent, and this respondent thinks it probable

91

that said Charles Bent may have conversed with the Mexican government in favor of granting him his said claim, but whether he did so or not this respondent does not know. That while his petition was pending before the Mexican government for the grant of land mentioned in said bill, he conversed frequently with said Charles Bent upon the subject, and in one of these conversations told said Charles Bent that if he obtained said grant, he would make him a present of one-fourth part thereof, but did not then state in what part of said tract, nor that it should be an undivided third or fourth part, nor did he so state at any time or in any other conversation with Charles Bent. Neither did said Charles Beaubien or said Miranda, to his knowledge, after said grant was obtained, and they were placed in possession thereof, acknowledge the services of said Charles Bent in the premises or that he had an equal interest with them in said claim. That said Charles Bent did at the time mentioned in said bill of complaint and from the time of the granting of said land up to the time of the death of said Charles Bent, this respondent did not offer nor did said Charles Bent request of this respondent that he would carry into effect the verbal promise aforesaid, by designating the fourth part which this respondent had promised to give to said Charles Bent. That after the death of said Charles Bent this respondent's kind feeling for him and regard for his children, induced in him a desire to benefit them, and knowing them to be his natural children and believing them not to be heirs-at-law to their said father upon that account believing also that by donating the same to said plaintiff, he would be carrying out what he thought would be the wishes of their deceased father; he laid off and designated and offered to donate to said complainants the one-fourth of said tract, at a point at which he considered valuable, but his offer was met by them with a refusal and a claim on their part of one undivided third portion of said tract as a matter of right, which this respondent refused to consider.

Your respondent further states that at the time said grant was made to your respondent and said Miranda, the same was an uncultivated wilderness, surrounded by hostile Indians and for this reason utterly uninhabitable, but that since then it has slowly and gradually become valuable, and this increased value has been caused chiefly by the labor and capital and diligence of this respondent and the defendant, Lucien B. Maxwell, to whom said defendant, Beaubien, had sold a portion of said land, and of other tenants and purchasers under said Maxwell, during the period of years and under circumstances of danger, risk and exposure which few would have undertaken for the original value of said land. And this defendant, Beaubien, here states that he, the said Beaubien, and said defendant Maxwell, Jose Pley and others, tenants and purchasers as aforesaid, have expended on said tract of land in labor and capital as aforesaid an amount not less than twelve thousand dollars, and also that said defendants, Beaubien and Miranda, have expended in the defense of the lawsuit referred to in exhibit to complainants' bill, as also remunerating the services of counsel before the surveyor of said Terri-

93 tory, in procuring the approval of said claim, the further sum of two hundred dollars, in all of which expenditures of money, capital and labor so paid out and expended by said defendants Beaubien, Maxwell and others, neither the said complainants nor their said father have ever shared or offered to share, although the same were matters of public notoriety, and this respondent never promised during this long period of time that his kindly and friendly disposition toward said complainants, and their said father was to be repaid by making use of it as a pretext to urge a claim so evidently inequitable and unjust. This respondent also denies all fraud, collusion, confederacy or combination with intent to defraud said complainants of their rights, so unjustly charged upon him in said bill of complaint, without this that any other matter or thing in said bill contained material or necessary for this defendant to answer and not herein well and sufficiently answered, confessed, avoid-, traversed or denied is true, all which matters and things this respondent is ready to aver, maintain or prove, as this honorable court may direct, and humbly — to be dismissed with his reasonable costs and charges by him in his behalf most wrongfully sustained, and will ever pray.

BAIRD & WHEATON,
Solicitors for Defendant Beaubien.

TERRITORY OF NEW MEXICO, }
County of Taos, } ss.:

Charles Beaubien, having been duly sworn, states that the matters and things set forth and contained in the above answer, as derived from his own knowledge, are true, and those stated as derived from the knowledge of others he believes to be true.

CHARLES BEAUBIEN.

94 Sworn to and subscribed to before me, this 6th day of September, A. D. 1860.

WILLIAM G. BLACKWOOD, *Judge.*

UNITED STATES OF AMERICA, }
Territory of New Mexico. }

I, William Breeden, clerk of the first judicial district court of said Territory, do hereby certify that the above and foregoing is a true and perfect copy of the original paper on file in my office.

Witness my hand and the seal of said court this 11th day of May A. D. 1872.

[Seal Jud. Dist. Court, N. M.]

W. M. BREEDEN, *Clerk.*

Copy of Answer of Lucien B. Maxwell.

UNITED STATES OF AMERICA, }
 Territory of New Mexico, County of Taos, } ss :

In the District Court for the Second Judicial District, Held for said County, at September Term, 1860.

ALFRED BENT *et als.* }
vs. } Chancery.
 CHARLES BEAUBIEN *et als.* }

The defendant Lucien B. Maxwell, saving and reserving to himself all, and all manner of benefit of exception that can or may be taken to the manifold errors, uncertainties and imperfections in plaintiffs' bill contained for answer, thereto or to so much thereof as he is advised is sufficient to answer, answering says: That

95 it is true as therein alleged that the tract of land therein described was granted to said Beaubien and Miranda by the Mexican government; that it is also true that he now occupies a portion of said land as stated in said bill, and that he occupies it by reason of a purchase made of a portion of the claim of said Charles Beaubien, shortly after the making of said grant and also of a purchase made by him, the said Maxwell, of the whole claim of said Miranda at a more recent period, which will appear more fully by the deeds made by said Beaubien and Miranda to said Maxwell, prayed to be made a part of this answer and be produced whenever they may be hereafter required; that he purchased the same in good faith and for a valuable consideration and has since sold a portion of the same to defendant, Joseph Pley, also for a valuable consideration; that he knows nothing of any contract or agreement between said Beaubien and Miranda and said Charles Bent, such as set forth in said bill, nor does he know of any transactions between said Charles Bent and said Beaubien and Miranda of the character mentioned in said bill of complaint, nor by what influences said grant was obtained by said Beaubien and Miranda from the Mexican government; that he has no other or further claim to said land other than stated in this answer. He also denies all fraud or conclusion or combination or confederation as charged upon him in said bill of complaint, without this that any other matter or thing in said bill contained material or necessary for this defendant to answer, and not herein well and sufficiently answered, confessed, avoided, traversed or denied is true. All which matters and things this respondent is ready to aver, maintain or prove as

96 this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges by him in this behalf most wrongfully sustained, and will ever pray, etc.

WHEATON.
For Respondent Maxwell.

TERRITORY OF NEW MEXICO, } ss:
County of Taos,

Lucien B. Maxwell makes oath and say-, that the matter and things above, in his answer set forth and contained, are true.

L. B. MAXWELL.

Subscribed and sworn to before me, this 4th day of September, A. D. 1860.

WM. G. BLACKWOOD,
*Judge of the Second Judicial District of the
Territory of New Mexico.*

Joseph Pley's answer was made April 7th, 1860, as follows :

Copy of Answer of Joseph Pley.

ALFRED BENT and Others }
vs. } Chancery.
CHARLES BEAUBIEN and Others.

97 In the District Court for the Second Judicial District in the Territory of New Mexico, for the County of Taos.

And the said Joseph Pley, saving and reserving to himself all and all manner of right of exception to the manifold errors, imperfections and inconsistencies in the complainants' bill contained for answer thereto, or so much thereof as he has been advised, it is sufficient for him to answer answering, says:

That about the month of June, in the year of our Lord one thousand eight hundred and fifty-nine, he purchased of Lucien B. Maxwell, a portion of the land alluded to and set forth in complainants' bill, including a large part of the land on the River Rayado, bounded as follows: that he purchased the same of said Maxwell in good faith, for a valuable consideration, to wit: the sum of seven thousand dollars, and upon the payment thereof, took possession of the land so purchased, and now resides thereon.

That he knows nothing of the claim of said complainants at the time of said purchase and up to the present time, except as he is informed by the allegations in said bill of complaint. He denies all fraud combination or confederacy as set forth in said bill, and denies all knowledge of the matters and things in said bill contained. Prays to be dismissed with his reasonable costs by him in this behalf most wrongfully sustained.

JOSEPH PLEY.

Sworn to and subscribed before me this seventh day of April, 1860.

WM. G. BLACKWOOD, *Judge.*

98 Replications to these several answers were duly filed, and the cause came to hearing in 1865. No evidence appears in the record, but the decree which follows recites that the cause was
8—388

heard upon the pleadings and testimony on file as taken in the cause, the files in said cause having been lost or misplaced, and only the pleadings having been found after the filing of the Maxwell Company's bill in 1870. On June 3rd, 1865, an interlocutory decree was made and entered of record in said cause as follows:

United States District Court, County of Taos, September Term, 1,-
1865.

ALFRED BENT, ESTEFANA HICKLIN and ALEX-
ander Hicklin, Her Husband; Teresina
Bent, Alias Teresa T. Bent, and Aloys
Scheurick, Her Husband, and also by Her
Next Friend, Ceran St. Vrain,

vs.

GUADALUPE MIRANDA, JOSEPH PCEY, LUZ
Beaubien and Lucien B. Maxwell, Her
Husband, and the said Maxwell; Leonor
Beaubien, Petra Beaubien and Jesus G.
Abreu, Her Husband; Teodora Beaubien
and Frederick Miller, Her Husband; Juana
Beaubien and Joseph Clothier, Her Hus-
band, and Pablo Beaubien, Minor, and the
said Frederick Miller, His Guardian, and
Vidal Trujillo, the Husband of the said
Leonor Beaubien, Defendants.

Bill in Chancery for
Partition of Real
Estate.

And now on this day came the parties by their counsel, and this cause having been at a former term of this court heard upon the bill and amended bill, and the answer thereto, the supplemental bill and the answer, and the testimony herein on file, as taken in this cause, which cause was taken under advisement by the court as to the decree which should be made in the premises, and the court being fully advised, in consideration thereof, therefore, it is ordered, adjudged and decreed by the court that the said complainants, Alfred

Bent, Estefana Hicklin, and Teresina, otherwise Teresa T.
99 Bent, be and are hereby declared to be the natural son and
daughters of the said Charles Bent in the said bill men-
tioned, by him begotten upon and conceived and borne of Ygnacio
Jamarillo, within the Territory of New Mexico, formerly the depart-
ment or province of New Mexico, and at the time the said Alfred,
Estafana and Teresa were begotten and conceived, no lawful imped-
iment existed to prevent the said Charles Bent and Ygnacio
Jamarillo from in due form of law solemnizing a contract of mar-
riage, the one with the other; that as such natural children the
said Alfred, Estefana and Teresa, in the absence of any child or heir
born in wedlock to the said Charles Bent, became and were at the
time of his decease the true and lawful heirs of his body in this Ter-
ritory, with the full power, right and authority to inherit, succeed
to and receive the estate, property, rights and interests of property
of the said Charles Bent in the said Territory, and that as such

children and heirs they are justly and lawfully entitled to have, maintain, receive, possess and enjoy all the rights, interest and estate which in law or equity belonged or pertained to the said Charles Bent at the time of his decease, of, in or to the lands, real estate or grant as described and set forth in the complainants' bill and the exhibit therein referred to, which description is as follows, to wit: Commencing below the junction of the Ryado river with the Colorado, thence in a direct line to the east to the first hills, and from thence running parallel with said Colorado river to the north, to a point in front of the junction of the Una de Gato with the said Colorado river, thence following said hills to the east of the said river of the Una de Gato, to the summit of the mesa, thence turning to the northeast along said summit, to the summit of the mountain that separates the waters that flow to the east from those that flow to the west, and from thence following the said mountain to the south of the first ceja, south of the Ryado river, and from thence following the summit of said ceja, east to the place of beginning.

100 It is further ordered, adjudged and decreed that the said Charles Bent at the time of his decease was justly and equitably entitled and seized of one undivided fourth part of the estate in and to the said tract of land, real estate or grant, and that the said Charles Beaubien and Guadalupe Miranda were at said time so entitled and seized of an equal undivided share of the remaining three-fourths of the said tract or grant.

Furthermore, that the said Alfred, Estefana, and Teresina (alias Teresa T.), upon the decease of their said father, inherited succeeded to and became seized of the said undivided one-fourth part interest and estate which belonged or pertained to the said Charles Bent in law and equity, in and to the land or real estate in the entire tract or grant aforesaid, at the time of his decease, and that the said Alfred Bent, Estefana and Teresina, are now fully and absolutely entitled to and seized of the undivided one-fourth part of the interest and estate of the said tract of land or grant.

Furthermore, that the said undivided one-fourth part in and to the said tract or grant of land or real estate be and hereby is declared established and confirmed to them, the said Alfred, Estefana and Teresina (alias Teresa T.) and to their heirs and assigns forever, with the full and perfect right, powers and authority to possess and enjoy the same.

It is further ordered, adjudged and decreed that a just and equitable partition be made of the said tract of land or grant between the said Alfred, Estefana and Teresina, and the said daughters and son of the said Charles Beaubien deceased, defendants herein, and Lucien B. Maxwell, the assignee and grantee of the said Guadalupe Miranda, according to the rights, interests and estate hereinabove declared between the respective parties.

101 Furthermore, that the special commissioners hereinafter appointed to make and allot the said partition shall first take and subscribe an oath before the judge or the clerk of this court, the clerk of the probate — for the county of Mora, or the justice of the

peace within and for the precinct including the county-seat of said county to well and faithfully, without partiality, prejudicial favor or ill will, to the best of their knowledge, understanding, skill and abilities, make a partition and allotment of the said tract of land or grant, between the parties and in the manner or form prescribed and required in this decree, and the said oath so taken and subscribed shall be duly certified by the officer administering the same and by the commissioners, annexed to and returned with the report by them to be made to this court.

That when the oaths shall be so taken and subscribed, the said commissioners shall jointly proceed in person upon the said tract or grant and without any unnecessary delay, and shall inspect the same throughout its extent and especially the streams and springs of water and their capacities, one year with another to supply water for the purpose of irrigating the lands connected with or contiguous to the said streams, susceptible of cultivation and irrigation; the mines and minerals of whatsoever description; the quarries of rock or stones; timber for building, fencing and firewoods; the lands suitable for plowing, planting and sowing; and grounds and — for pasturage.

They shall then make a partition of the said tract or grant, according to quantities, quality and value, and designate and describe the tracts or partitions divided by such descriptions, and natural and artificial objects, or marks or boundaries as shall remain plain and permanent and easily found. They shall part and lay off one-fourth part of the said tract or grant and divide, part and lay off the remaining three-fourths of the same into two equal parts.

102 In making the said partition of one-fourth and of the said three-fourths, regard shall be had to the buildings, acequias, cultivation and improvements made by the said Lucien B. Maxwell, upon the said tract or grant of land and nothing shall be credited to the other parties or charged and considered against the said Maxwell for any buildings, acequias, cultivation or improvements made and added to the said grant or tract of land by him or by persons holding and possessing by or through him in good faith. This shall have especial reference to the commencement of this suit upon the twelfth day of September, one thousand eight hundred and fifty-nine, and to the principal places and portions then occupied and improved by him and those by or under him. That in making and allotting the parts therein decreed, ordered and adjudged to be partitioned, the portions which shall be portioned and allotted to the said Maxwell shall include the portions of said tract or grant, which the said Maxwell, or those under or through him, occupied and had cultivated and improved before the commencement of the suit and since continued to occupy and improve, and the chief and principal portions, the said Maxwell has occupied and improved since the commencement of this suit.

In case the said Maxwell since the commencement of this suit has by himself or others in parts of said tract or grant remote from the principal farms and improvements actually occupied by him, made slight or temporary cultivation or improvements, which shall in-

elude the lands and waters in such manner as to leave not an equitable and just portion of the waters and cultivatable land to be parted to the other parties in this cause, then and in such case, the said remote land and waters included in such improvements or slight cultivations, shall in the partition to be made in this cause be considered and included in the said partition, the same as if the

103 said improvements were not made upon the said lands. In such case the commissioners shall assess the just and true value of the land covered by such improvements without their being added to the said lands, and also the said improvements by themselves exceeding the just and true value of them over and connected with the said lands and report the facts with their general report to this court, carefully noting the different assessed values, so that the court may decree justly and equitably concerning the same between the parties.

Furthermore, when the commissioners shall have parted the tract or grant of land as herein provided, they shall allot the one-fourth part to the said Alfred, Estefana and Teresa, (alias Teresa T.) Bent, and an equal portion of the said three-fourths, the one to the said Lucien B. Maxwell, and the other to the said son and daughters of the said Charles Beaubien, deceased.

In estimating the value of any improvements referred to herein, as made in certain remote places, and under the circumstances specified, the commissioners will also assess and report the value of the rents and profits since such places have been occupied and cultivated.

In parting and allotting to the said Maxwell the portion to be allotted to him, the said commissioners are hereby specially charged to estimate in the partition the lands which include the buildings, acequias, farms and other improvements by him made, or by others through or under him, in good faith, without reference to the value of any of the said improvements, that this provision does not extend to the aforesaid remote places and the improvements hereinbefore specially specified as connected therewith.

It is further ordered, adjudged and decreed that Lucien Stewart, of Taos county, and Vicente Romero and William Kroenig, of the county of Mora, in said Territory, be and they hereby are

104 appointed to execute and perform all the requirements and provisions of this decree, required of and to be done by commissioners, and that they make full, plain and exact report of their proceedings to the next term of this court.

Furthermore, it is ordered, adjudged and decreed that the said complainants pay to the said defendants, Maxwell and the said daughters and son of the said deceased Charles Beaubien, the sum of one hundred dollars, the one-fourth part of the amount expended towards the procuring of the confirmation of the said tract or grant of land by the Government of the United States.

The court now reserves and suspend-making its decree as — the partition and payment of the costs in this cause, until a future term of the court:

It appearing to the satisfaction of this court, upon the suggestion

of the complainants, that since the last term of this court, Leonor Beaubien has been regularly and lawfully divorced from the bonds of matrimony before existing between her and the said Vidal Trujillo, it is ordered by the court that he be and hereby is dismissed from these proceedings, and that the clerk furnish a copy of this decree to the said Maxwell and also to the commissioners, and one for the said son and daughters, should these latter require the same, and that this cause stand continued until the next term of this court.

Signed June 3, 1865.

KIRBY BENEDICT,
Chief Justice.

105 The heirs of Beaubien appear as parties defendant in this decree, Beaubien having died in 1864.

The commissioners appointed by the foregoing decree never acted. Maxwell declared that he would appeal the cause, and, if necessary, carry it to the Supreme Court of the United States. Afterwards the Bent heirs, complainants in said suit, entered into negotiations with Maxwell for a compromise of the litigation on the basis of Maxwell paying them a money consideration to relinquish their claim. It was understood between Alfred Bent and Sheurick, with the consent of their wives and Mrs. Hicklin, that either Alfred Bent or Sheurick or both of them should act in the matter as agents to sell Maxwell, if they could, their interests in the grant for the best price they could get, but never less than \$21,000, or what Beaubien's heirs got. Over-

tures for compromise were made by Alfred Bent, acting for
106 himself and his co-complainants, his two sisters and their husbands, in September or October, 1865, when he went to Maxwell's residence, at Cimarron, to try and make a sale of their interest. These were made with the approval of Judge Houghton, one of their counsel, whom Bent consulted about it, and who told Bent he had better settle for himself and the other heirs by compromise rather than to take the award of the commissioners. Bent demanded \$21,000; Maxwell offered \$18,000. Bent returned to Taos, where his family resided, without having affected a definite agreement with Maxwell as to price. The Bents considered the sale as good as made, but Alfred Bent said to his co-complainants that they could get a few thousand more by being quiet a few days, insisting, however, on having as much as the Beaubien heirs got; they then expected to close the bargain in a few days; were ready to make the deeds as soon as the matter was settled, and the deeds had already been written out by Sheurich, husband of Teresina Bent. Before anything further was done in the matter of the proposed compromise Alfred Bent died, in December, 1865, leaving surviving him his widow, Guadalupe Bent, and three infant children, viz., Charles, Julian, and Alberto Silas, aged respectively six, four, and one year, and on April 12th, 1866, said Guadalupe was appointed by the probate court of Taos county administratrix of the estate of Alfred Bent, and duly qualified as such. A few hours before said Bent was shot, on December 3rd, 1865, he directed one of

the commissioners appointed to make partition to proceed therewith as soon as possible, saying he considered his interest and that of his sisters worth \$150,000.

107 Alfred Bent left a will, which was duly probated, which said will and the record of probate thereof and of the inventory and other proceedings connected with said estate are in words and figures following:

Petition of Guadalupe Bent for Appointment as Administratrix.

To the Honorable Pedro Sanchez, probate judge of the county of Taos, Territory of New Mexico:

108 Your petitioner Guadalupe Bent before your honor respectfully represents that on the — day of the month of — A. D. 1865, my deceased husband Alfred Bent made and executed a testament and last will, as in it expressed, I as his wife which I was, am therein named by him as administratrix and executrix of his hereditary goods, in due course of law I appear before you- honor in order that you may be pleased to order that letters of administration of the estate of my husband according to the form of the statute for such cases made and provided offering to execute the necessary and sufficient bonds required by law, and your petitioner will ever pray, etc.

County of Taos, April 12, 1866.

her
GUADALUPE x BENT.
sign.

TERRITORY OF NEW MEXICO, }
County of Taos. }

I Ynocencio Martinez clerk of the court of probate in and for the county of Taos and Territory of New Mexico, do hereby certify that the foregoing part of one page contains a full true perfect and correct copy of the entire and full petition of Guadalupe Bent to the Hon. Pedro Sanchez then judge of probate for said county for letters of administration on the estate of her deceased husband Alfred Bent which said petition now remains on file and on record in the office of said clerk of said court of probate.

In testimony whereof I have hereunto set my hand and 109 affixed the seal of said court of probate within and for the county of Taos this the — day of December, A. D. 1872.

[SEAL.] YNOCENCIO MARTINEZ, Clerk.

Oath of Guadalupe Bent, Administratrix.

TERRITORY OF NEW MEXICO, }
County of Taos, }

Before me the undersigned clerk of the probate court in and for said county personally appeared Guadalupe Bent and under oath declared that Charles Bent, Julian Bent, and Alberto Silas Bent

are the only children of the deceased Alfred Bent her husband late of this county; that she as lawful administratrix of the estate of her said deceased husband would make a true and perfect inventory of all and each of the goods, real property, chattels, animals, debts, rights and claims; pay all the debts of said estate if any should appear; that she would render full account to the probate court whenever she may be so required relative to the management of the administration of said estate; that she would make an equal distribution of the same among the respective legitimate heirs as she may be required, and that in general she would discharge in all things her legal duty as administratrix of the estate until the conclusion of such administration.

her
GUADALUPE (x) BENT.
sign.

Sworn to and subscribed before me, this 12th day of April, A. D. 1866.

YNOCENCIO MARTINEZ,
Clerk of the Probate Court.

[SEAL.]

110 TERRITORY OF NEW MEXICO, }
County of Taos. }

I, Ynocencio Martinez, clerk of the court of probate within and for the county of Taos and Territory of New Mexico, do hereby certify that the foregoing part of one page of writing is a full, complete, correct and perfect copy of the original oath of administration of Guadalupe Bent as administratrix of the estate of Alfred Bent, deceased, taken in full and complete from the said original which remains on file and of record in the office of the said clerk of the court of probate.

In testimony whereof I have hereunto set my hand and affixed the seal of said court of probate this the — day of December, A. D. 1872.

[SEAL.]

YNOCENCIO MARTINEZ, *Clerk.*

Probate of Will of Alfred Bent.

DON FERNANDO DE TAOS, N. M.,
WEDNESDAY, the 6th Day of March, 1867.

At ten o'clock in the forenoon the court met.

Present: The Hon. Pedro Sanches, judge of probate; Leandro Martinez, clerk, and Pablo Martinez, deputy sheriff.

The order of business is as follows:

The administrators of the estate of Alfred Bent, deceased, presented the will of said deceased for approval. The court examined said will and the witnesses in it mentioned, and finding it correct according to law, approved it and ordered that it be recorded in this office.

111 TERRITORY OF NEW MEXICO, }
County of Taos, } ss :

I, the undersigned, J. U. Shade, clerk of the probate court of said county, do hereby certify that the above is a true and perfect copy from the record of the proceedings of said court at the March term thereof, 1867, as the same appears in Book C, No. 2, of the records of the said court, on page 253.

Witness my hand and the seal of said court this 3rd day of October, 1884.

[SEAL.]

J. U. SHADE, Clerk.

Will of Alfred Bent, Deceased.

In the name of God Amen.

I Alfred Bent, being of sound mind and memory, and knowing the uncertainty of life and the certainty of death do hereby devise and decree as my last will and testament, in the presence of the subscribing witnesses, as follows to wit: first, I give and bequeath unto my wife Guadalupe Long Bent; for the maintainance of her and my three children Charles, William and Silas Bent, all of my real and personal property—money goods and effects after my just debts have been paid which are as follows to wit—to North and Scott of St. Louis the sum of five hundred and sixty-nine dollars with interest; to Mrs. S. Beuthner and L. B. Maxwell sixty dollars—to David Webster the sum of four dollars; which debts I desire shall be paid. I desire that my said wife shall be my executor and may join with her if necessary any person who may desire for her benefit and that of my children heirs as aforesaid.

112 In testimony whereof I have this 9th day of December,

A. D. 1865, subscribed my name in the presence of subscribing witnesses.

Witnesses :

Codicil—The debt due North and Scott of the city of St. Louis is jointly due by myself and Horatio Long of Colorado Territory.

(Signed)

ALFRED BENT.

FERNANDO MAXWELL.

W. A. NITTERIDGE.

JOS. S. HURT.

CHARLES HART.

Inventory of the Estate of Alfred Bent, Deceased.

Inventory which contains the goods of the deceased Alfred Bent, late of the county of Taos, commenced this 6th day of March, A. D. 1867.

Half of house, six rooms (at the rancho).....	\$300 00
200 varas of tillable land.....	200 00
27 cows at 20 dollars.....	540 00
9—388	

8 steers at 20 dollars.....	160 00
90 fanegas wheat at \$2.00 dollars....	180 00
14 fanegas of corn at \$2.00.....	28 00
Money	500 00
By note of Lucien B. Maxwell.....	5,000 00
The eighteenth part of twenty-one miles square of land situated in the Territory of Colorado on the Las Animas river, Huerfano and other small streams, under our oath and having investigated the condition and situation of said land we value it a little more or less at five thousand dollars.....	
113	5,000 00

Total amount..... \$11,908 00

This inventory was finished this 6th day of March A. D. 1867.

GUADALUPE THOMPSON *Née* LONG,

Administratrix.

YNOCENCIO MARTINEZ AND

JUAN B. LA ROUX, *Appraisers.*

This inventory has been examined and approved this 6th day of March, 1867.

PEDRO SANCHES,

Probate Judge.

TERRITORY OF NEW MEXICO, } ss:
County of Taos,

I certify that the foregoing are true and exact copies of the will and inventory of the estate of Alfred Bent, deceased.

In witness whereof, I have hereunto set my name and the seal of the probate court, this 6th day of March, 1867.

LEANDRO MARTINEZ,

Clerk of the Probate Court.

[SEAL.]

TERRITORY OF NEW MEXICO, } ss:
County of Taos,

114 I, the undersigned J. U. Shade clerk of the probate court of said county hereby certify that the foregoing three pages and five lines contain a full true and perfect copy of the will of Alfred Bent and of the inventory of his estate as the same appears of record in my office in Book B, No. 4, of Records of Wills and Administrations on pages 216 and 217.

Witness my hand and seal of said court this 3rd day of October, 1884.

[SEAL.]

J. U. SHADE, *Clerk.*

Allowance of Account Against Estate of Alfred Bent.

To Guadalupe Thompson, administratrix of Alfred C. Bent, late of the town of El Rancho, in the county of Taos and Territory of New Mexico, deceased:

Take notice that on the first day of the next ensuing term of the court of probate within and for the county of Taos aforesaid I shall

present for allowance against the estate of Alfred C. Bent, deceased a claim for the sum of one thousand seven hundred and ninety dollars, founded on account of which the following is a copy :

TRINIDAD, C. T., Oct. 25, 1867.

Estate of Alfred Bent, dec'd, to Horatio Long, Dr.

1867. To cash had and received \$1,790 00

(Signed)

HORATIO LONG.

TERRITORY OF COLORADO, }
County of Las Animas, } ss :

115 I the undersigned administratrix of the estate of Alfred C. Bent deceased hereby acknowledge service of foregoing notice of demand against the said estate this twenty-fifth day of October, A. D. 1867.

(Signed)

GUADALUPE THOMPSON,

Administratrix of the Estate of Alfred C. Bent, Deceased.

JOSE MA. MARTINEZ.

TERRITORY OF COLORADO, }
County of Las Animas, } ss :

This day personally appeared before me the undersigned a United States commissioner within and for the third judicial district of the Territory of Colorado aforesaid, Horatio Long, and being duly sworn on his oath according to law says that — the best of his knowledge and belief he has given credits to the estate of Alfred C. Bent, deceased, for all payments or offsets to which it is entitled and that the balance there claimed is justly due.

(Signed)

HORATIO LONG.

Sworn to and subscribed before me, this 25th day of October, A. D. 1867.

A. W. ARCHIBALD,

United States Commissioner in and for the Third

Judicial District of the Territory of Colorado.

TERRITORY OF COLORADO, }
County of Las Animas, } ss :

I, the undersigned, administratrix of the estate of Alfred C. Bent, deceased, hereby certify that within my own personal knowledge the foregoing demand of Horatio Long is true in all its particulars, and that the sum of one thousand and seven hundred and ninety dollars is justly due, and I hereby consent to the allowance of a judgment for the same without the necessity for my personal appearance in the said court of probate.

116

Witness my hand hereunto set this 25th day of ^eOctober, A. D. 1867.

(Signed) GUADALUPE THOMPSON,
*Administratrix of All and Singular the Goods and Chattels,
 Rights and Credits that were of Alfred C. Bent, Deceased.*

Witness:

JOSE MA. MARTINEZ.

TERRITORY OF NEW MEXICO, { ss :
County of Taos,

Be it remembered that George Thompson being duly sworn in open court on this 5th day of November, A. D. 1867, on his oath says that he knows the foregoing affidavits, and other parts of the above proceedings were had as recorded; that he personally knows the parties thereto; and was personally present at the execution of the same; and that the same are true in all particulars as above stated.

G. W. THOMPSON.

Sworn to and subscribed in open court at our November term, A. D. 1867.

JUAN SANTISTEVAN,
Probate Judge.

Examined and approved this 5th day of November, A. D. 1867.

JUAN SANTISTEVAN,
Probate Judge.

117 The said will and foregoing record of proceedings in the probate court of Taos county, New Mexico, were not introduced in evidence in the present litigation until at the close of the testimony taken under the Maxwell Company's amended bill and the Bent heirs' bill, in 1866, and after the case of Thompson vs. Maxwell, 3 N. M., 269, had been decided by the supreme court of New Mexico and remanded to the district court.

Beaubien had left six children; Maxwell married one of them, and purchased the interest of the other five for a consideration of not more than \$3,500 each, at the following dates: Juana and her husband, Joseph Clouthier, and Isadora and her husband, Frederick Muller, April 4th, 1864; Eleanor and her husband, Vidal Trujillo, July 20th, 1864; Petra and her husband, Jesus G. Abreu, February 1st, 1867; Paul Beaubien, January 1st, 1870. Muller and Clouthier were merchants residing at Taos; Trujillo and Abreu were farmers, stock-raisers, and also had stores; all four of them, as well as Sheurich and Hicklin, the husbands of Alfred Bent's two sisters, were intelligent men, ranked among the best citizens in their community, and were considered men of wealth and influence.

At the April term, 1866, of the district court for Taos county, and on the 9th day of that month, the death of Alfred Bent was suggested by counsel for complainants in the then pending suit, and,

on their motion, his three infant children, Charles Bent, Julian Bent, and Alberto Silas Bent, were made parties complainant by the following order entered of record in said cause :

118 Be it remembered that at a regular term of the district court for the first judicial district of the Territory of New Mexico, begun and held within and for the county of Taos, on the 9th day of April A. D. 1866, on the second day of said term, among other things the following proceedings were had, and were in the words and figures following, to wit :

ALFRED BENT and Others	}	No. 1. In Chancery.
vs.		
THE HEIRS OF CHAS. BEAUBIEN and Others.		

Now on this day came the complainants by their counsel and suggest to the court the death of Alfred Bent, one of the complainants herein, and moves the court for leave to make Chas. Bent, Julian Bent, and Alberto Silas Bent, his children and heirs, parties complainants herein, which said motion is granted by the court, and the said Chas. Bent, Julian Bent and Alberto Silas Bent, are hereby made parties complainant to this bill of complaint.

And afterwards, to wit, on the fourth day of said term of said court, among other things the following proceedings were had, which are in the words and figures following, to wit :

119 The two last above mentioned orders were made at the instance and in accordance with the wish of said Maxwell or his counsel as necessary to the validity of the conveyance.

Afterwards, at the same term, on motion of solicitors for complainants, an order appointing Guadalupe Bent guardian *ad litem*, etc., was made and entered of record in said cause as follows :

ALFRED BENT and Others	}	No. 1. In Chancery.
vs.		
THE HEIRS OF CHARLES BEAUBIEN and Others.		

By agreement of the parties, the continuance of this cause, made herein on a former day of this term of this court, is set aside, and, on motion of solicitors for complainants, Guadalupe Bent — hereby appointed guardian *ad litem* and commissioner in chancery for the minor heirs of Alfred Bent in this cause, with full power to execute deeds, or to carry into execution all sales or transfers made of their interest in and to the real estate therein described to Lucien B. Maxwell, one of the defendants in said cause, and this cause stands continued until the next term of this court.

120 In the meantime the negotiations for compromise, which had been interrupted by the death of Alfred Bent, were resumed, the Bent heirs being now represented by Aloys Sheurich, husband of Teresina, one of the adult complainants, who acted in

said negotiations on behalf of his wife, Estefana and her husband, Hicklin, and Guadalupe Bent. A settlement with Maxwell was concluded by Aloys Scheurich, acting for his wife, Mrs. Hicklin and her husband, and Guadalupe Bent as guardian *ad litem* for Alfred's children, which was acceptable to said parties, by which Maxwell was to pay the sum of \$18,000 for the conveyance of the interest or claim of the Bent heirs. The compromise was advised by Merrill Ashurst, the leading counsel for the Bent heirs, the grounds of his advice not being stated. It was accepted and carried out by the adult complainants Teresina and Estefana and their husbands, Sheurich and Hicklin. Sheurich and the other complainants did not consider their claim after the decree of 1865 as being doubtful or uncertain, but made a settlement, one of the reasons therefor being the consideration that the lawsuit involving their interests might drag on a long time and that they were doubtful when the end would be reached, Maxwell having said to Sheurich that he would outlaw them or put them off from court to court, he having means to do so, and having some time before told Sheurich that he paid his attorney \$1,000 to put the case off for six months.

On May 3rd, 1866, in pursuance of said compromise, Guadalupe Bent *née* Long executed a deed to Maxwell for the stated consideration of \$6,000 as follows:

121 (U. S. I. R. S. \$10,000, Taos, N. M., May 3, 1866.)

Know all men by these presents, whereas, I, Guadalupe Bent *née* Long, of the town of El Rancho, in the county of Taos, and Territory of New Mexico, and widow of Alfred Bent, late of the same place, deceased, by virtue of a decree and order of the district court of the United States of America, for the first judicial district, of the Territory of New Mexico, at the April term of said court A. D. 1866, held within and for the said county of Taos, was appointed guardian *ad litem*, and commissioner in chancery for Charles Bent, Julian Bent and Albert Silas Bent, minor heirs of the said Alfred Bent, deceased, as aforesaid; and, whereas, the words of said decree and order of said court are as follows, to wit:

"Territory of New Mexico, First Judicial District Court, County of Taos, April Term, 1866.

ALFRED BENT and Others	}	(No. —.) In Chancery.
<i>vs.</i>		
THE HEIRS OF CHARLES BEAUBIEN and Others.		

"By agreement of the said parties, the continuance of the cause made herein on a former day of the present term of this court, is set aside, and on motion of solicitors for complainant, Guadalupe Bent is hereby appointed guardian *ad litem*, and commissioner in chancery for the minor heirs of Alfred Bent in this cause, with full power to execute deeds, or carrying into execution all sales or transfers made of their interest in and to the real estate therein

described, to Lucien B. Maxwell, one of the defendants in said cause, and that this cause stand continued until the next term of this court," all of which proceedings so had as aforesaid, will

122 fully appear by the records of said court, to which reference is hereby made. Now, therefore, by reason of the premises,

and by virtue of the power and authority on me conferred by the said decree, I, Guadalupe Bent, guardian *ad litem*, and resident as aforesaid, for and in consideration of the sum of six thousand (\$6,000) dollars to me in hand paid by the said Lucien B. Maxwell, of El Cimarron, of the county of Mora, and Territory of New Mexico, the receipt of which is hereby acknowledged, have granted, bargained and sold, conveyed, confirmed and transferred, as by these presents, I do grant, bargain and sell, convey, confirm and transfer unto the said Lucien B. Maxwell, his heirs and assigns, the following-described real estate, situate, lying and being in the aforesaid county of Mora, and Territory of New Mexico, and known and described as the "Rayado grant," heretofore granted to Charles Beaubien, and Guadalupe Miranda by Governor Armijo, on the eleventh day of January, A. D. 1841, and which is bounded and described as follows, to wit: Beginning on the east bank of the Rio Colorado at a mound of rocks; thence running in a straight line eastward to the first hills to another mound of rocks; thence continuing from south to north on a parallel line with the River Colorado to the third mound of rocks on the northern edge of the tablelands of Chicouca O'Chacuaco; thence running westward and following the edge of the said tablelands of Chacuaco to the top or comb of the Sierra Madre, to the fourth mound of rocks; thence from north to south, following the top of the said Sierra Madre to the Cuesta del Osha, one hundred (100 v.) varas, to the north of the road to Fernandez and to the Laguna Negra to the fifth mound of rocks; thence running anew to the east towards the Rio Colorado, and following the southern edge of the tablelands of Rayado and Gonzalitos to the eastern point of these tablelands to the sixth mound of rocks; and thence following in a northerly direction

123 tion until the said line strikes the Rio Colorado on the western bank of said river, where the seventh mound of rocks was placed.

To have and to hold the one undivided one twelfth (one-12th) interest, of, in and to the above-described real estate, together — all and singular, the rights, immunities, hereditaments, privileges and appurtenances thereunto belonging or in anywise appertaining unto the said Lucien B. Maxwell, and his heirs and assigns forever; the said one-twelfth undivided interest being the entire interest, estate, claim and demand of the said Charles Bent, Julian Bent and Alberto Silas Bent said minor heirs of their father, said Albert Bent, deceased, of, in and to the real estate as a child, and one of the heirs of Charles Bent, Senior, late of the Territory of New Mexico, deceased; and I, the said Guadalupe Bent, guardian *ad litem*, do hereby covenant to and with the said Lucien B. Maxwell, his heirs and assigns, that the above-described interest hereby conveyed of, in and to the said real estate, is free and clear from all incumbrances,

and that I, my heirs, executors and administrators, shall and will warrant and defend the title to the same unto the said Lucien B. Maxwell, his heirs and assigns forever, against the lawful claims or demands of all persons whomsoever.

In witness whereof, I have hereunto set my hand and seal this third day of May, A. D. eighteen hundred and sixty-six.

GUADALUPE BENT *Née* LONG, [SEAL.]

*Guardian ad Litem of Charles Bent,
Julian Bent, and Albert Silas Bent.*

Signed, sealed and delivered in presence of—

ADOLPH LETCHER.

WM. BLACKWOOD.

TERRITORY OF NEW MEXICO, } ss :
County of Taos,

Be it remembered that on the third day of May, A. D. 124 eighteen hundred and sixty-six, personally came before me the undersigned clerk of probate, within and for the county aforesaid, Guadalupe Bent *née* Long, who is personally known to me to be the same person whose name is subscribed to the foregoing deed of conveyance as party thereto, and she acknowledged that she executed the same as her free and voluntary act and deed, for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed the seal of the said court the day and year last above written.

[Seal Probate Court, Taos County, N. M.]

INOCENCIO MARTINEZ,

*Clerk of the Court of Probate for the County
of Taos, Territory of New Mexico.*

Filed at 3 o'clock p. m. January 16, 1870.

J. LEE, *Clerk.*

TERRITORY OF NEW MEXICO, } ss :
County of Colfax,

I, the undersigned, clerk of the probate court and *ex officio* recorder for said county, Territory aforesaid, do hereby certify that the foregoing is a true and correct — of the instrument as recorded in my office. Deed Book "A," pages 78, 79, 80, and 81.

Witness my hand and official seal, this first day of September, A. D. 1870.

[Seal Probate Court, Colfax Co., N. M.]

JOHN LEE,

Clerk Probate Court and ex Officio Recorder.

125 No other conveyance was made by Guadalupe Bent, the said conveyance having been prepared by counsel for Maxwell after one dictated by counsel for the Beaubien heirs.

On the same day Teresina Sheuruch *née* Bent, daughter of Charles

Bent and sister of Alfred Bent, executed to Maxwell a like conveyance, conveying a like interest for the recited consideration of \$6,000, with like covenants; and afterwards, on May 31st, 1866, Estefana Hicklin, also a sister of Alfred Bent and daughter of Charles Bent, joined by her husband, Alexander Hicklin, executed to Maxwell a like conveyance of a like interest for a recited consideration of \$6,000, with like covenants.

Afterwards, at the September term, 1866, of the said district court for Taos county, on September 13th, 1866, a decree was made and entered of record in said cause as follows:

And afterwards, to wit, at the September term of said court, 1866, begun and held on the 10th of said month of September, and on the 3rd day of said term of said court among other things the following proceedings were had, which are in the words and figures following, to wit:

GUADALUPE BENT, Guardian *ad Litem* for
Charles Bent, Julian Bent, and Alberto
Silas Bent, Minor Heirs and Children of
Alfred Bent, Deceased; Alexander Hicklin
and Estefana Hicklin, His Wife; Aloys
and Terisa Bent, His Wife,

vs.

LUCIEN B. MAXWELL, FREDERICK MILLER,
Jesus G. Abreu, Executors of the Estate
of Charles Beaubien, Deceased; Luz
Beaubien and Lucien B. Maxwell, Her
Husband; Leonor Beaubien, Teodora
Beaubien and Frederick Miller, Her
Husband; Petra Beaubien and Jesus G.
Abrieu, Her Husband; Juana Beaubien
and Joseph Clothier, Her Husband, and
Pablo Beaubien, by Frederick Miller, His
Guardian.

No. 1. In Chancery.

126 In the District Court for the County of Taos, in Chancery
Sitting.

Whereas an interlocutory decree was rendered at a former term of this court in the above cause, decreeing one-fourth of the land mentioned in the petition herein to the complainants in this cause, and appointing commissioners to divide and set apart the portion so decreed, and whereas said interlocutory decree was never carried into effect, and whereas since the time of the rendition of said decree a mutual agreement has been made between the parties to this cause, settling and determining all the equities in the same:

It is therefore hereby ordered, adjudged and decreed by the mutual consent and agreement of the said complainants as well as of the said defendants in this cause, that the interlocutory decree above mentioned, together with all orders made under and by virtue of the same be set aside; and by the mutual consent and agreement

of the said parties, it is hereby further ordered, adjudged and decreed that the said Lucien B. Maxwell, one of the defendants in this cause, pay to the said complainants the sum of eighteen thousand dollars, to be divided among them *per stirpes*, that is to the said Aloys Scheurick and Teresina Bent, his wife, one-third part, and to Alexander Hicklin and Estefana Bent, his wife, another third part, and to Charles Bent, Julian Bent and Alberto Silas Bent, the children and heirs of Alfred Bent, deceased, the remaining third part, to be equally divided among the said last named and to be paid into the hands of Guadalupe Bent, widow of the — Alfred Bent, deceased, and guardian *ad litem* for said children for the purposes of the said division.

And upon the further consent and agreement of the said parties, it is hereby further ordered, adjudged and decreed, that the said Alexander Hicklin and Estefana Bent, his wife, the said Aloys

127 Scheurick, and Teresina Bent, his wife, and the said Guadalupe Bent, guardian, *ad litem*, for Charles Bent, Julian Bent and Alberto Silas Bent, children and minor heirs of the said Alfred Bent, deceased, within ten days from the day of the date of this decree, make, execute and deliver to the said Lucien B. Maxwell good and sufficient deeds of conveyance of all their right, title, interest, estate, claim and demand of in and to the lands in controversy in this cause; the said Guadalupe Bent, guardian *ad litem* as aforesaid, in the name of Charles Bent, Julian Bent and Alberto Silas Bent, minor heirs as aforesaid, and the said Alexander Hicklin and Estefana Bent, his wife, and the said Aloys Scheurick and Teresina Bent, his wife, in their own names. And by further consent and agreement between the said parties, it is hereby further ordered, adjudged and decreed, that the costs of this suit shall be paid, each of the said parties to pay the separate costs in the same made by themselves.

128 The said decree was not made by the personal procurement, knowledge, or consent of said Scheurich or Guadalupe Bent, and the fact of the entry thereof was unknown to them for several years thereafter.

No other pleadings, orders, or proceedings in said cause, other than those above mentioned or recited, appear in the record thereof, and the record thereof does not show whether or not any inquiry was made by the court or by its authority touching the value of the said premises, or of the interest of the now plaintiffs therein, or as to the necessity of disposing of the same, or touching the other estate or means of the said infants, or the ability of the mother of said infants to maintain and educate the said infants, or touching the propriety, necessity, or advisability of such sale and conveyance of the interest of the now plaintiffs, nor does there appear of record any motion, petition, or showing against the propriety of the original decree vacated by the said decree of September, 1866.

The grant in question contains about one million seven hundred thousand acres, about two hundred thousand acres of which lie in the State of Colorado, and the balance in New Mexico, and contains some of the best and most valuable lands in the Territory; it con-

129 tains large areas of grazing and tillable land, and is traversed by several streams, furnishing water for irrigation, a small part of which was cultivated in May, 1866, and it contains, in addition, large bodies of timber, and in May, 1866, was known to contain considerable coal deposits, and was then believed and has since proven to have considerable deposits of precious metals, including gold and silver. At and about the year 1866 and for several years thereafter there was no demand for or sales of undivided interests in lands of the quantity, character, and location of those in question, such as to create any ascertainable market value thereof. Statements of the value of said land, in the opinion of the witnesses examined in the present suit, based upon a valuation per acre, are given in the testimony, varying from two and one-half cents to one dollar and twenty-five cents, and it is impossible from these statements to satisfactorily ascertain or fix what was the value per acre of said grant in or about 1866. It cannot be said from the testimony that there was a market for such grants at the time in the sense of a demand for them, their value being largely speculative for the future.

It is proven on the part of the complainants that the said Guadalupe Bent is a Mexican woman, and at the time of her said appointment as guardian *ad litem* to the infant complainants and at the time of the execution of her deed of May 3rd, 1866, was ignorant of the English language, unable to read, write, or speak the same; was unfamiliar with business or with her duties as guardian *ad litem*; was without knowledge of the boundaries or extent of said lands, or the character or value thereof, or of the act of Congress con-
130 firming the said grant, or of the particulars of the decree of

June 3rd, 1865; that Maxwell represented to Sheurich that the grant was not as large as it was supposed to be; that it did not extend into Colorado or beyond the Red river, whereas it did so extend over 200,000 acres; that said Scheurich and Guadalupe Bent believed and were influenced by said representations; that the said Maxwell, while generous and magnanimous in many respects, was unscrupulous and tyrannical as well, and was a resolute and determined man, and was at that time a man of large wealth and great power and influence throughout the county of Taos and Territory of New Mexico, as was known to said Guadalupe Bent, and he exercised such power and influence in such way that the weak feared to oppose him in matters of personal concern; that said Guadalupe Bent was in part influenced in executing said conveyance by this known character of Maxwell; that Maxwell made threats that unless the Bent heirs accepted the sum of \$18,000 for their claims they would never get anything, and that no one should occupy any part of his land, and that such threats were communicated to said Guadalupe, and that this and Maxwell's known character influenced her in making the conveyance to Maxwell; that the said conveyance was written in the English language and was not read over to said Guadalupe or interpreted to her, but it appears to be the fact that means of knowledge of the extent, character, and value of the said grant was open to the Bent heirs

and to their counsel. It was not definitely known at the time where the boundary line between Colorado and New Mexico was. Guadalupe Bent acted in concert with the adult complainants in the suit, dealing with their own interests on the same terms as those she represented, and she was willing to make the same settlement they did. Both Scheurich and the counsel for the Bent heirs were conversant with both the English and Spanish language- and could read and write the same.

It appears by Guadalupe Bent's own testimony, and the court accordingly finds, that when she executed the conveyance to Maxwell she understood there had been a settlement with Maxwell by which the interests of the Bent heirs were to be transferred to Maxwell for the sum of \$18,000; that she understood the document she signed was a transfer of the interest in the Maxwell grant, which had belonged to her husband, Alfred Bent; that the settlement for \$18,000 was satisfactory to her; that she supposed the document she signed was one which Scheurich had arranged with Maxwell; that she had relied on said Schurich for advice, and was willing to accept and do whatever he thought best in the matter; that she believed she had authority to sign the deed and to convey the interest in said grant which her former husband, Alfred Bent, had claimed or owned, and it was her intention by the said deed to convey to Maxwell whatever interest in said grant had belonged to said Alfred Bent in his lifetime and was left by him at his decease, and the court finds that no fraud, imposition, or error has been shown to have entered into said transaction or to have brought about said compromise decree.

No money was received by Guadalupe Bent from Maxwell at the time of the execution of said conveyance. Maxwell, upon the execution of the deeds by her and the two sisters of Alfred Bent, gave to them his three promissory notes, payable in one year, amounting in all to \$18,000, divided into such sums as were desired by the said parties. Guadalupe Bent received one of these notes for something over \$5,000. As to the payment of this note the testimony is conflicting. Guadalupe Thompson testifies that it was paid to her second husband, George W. Thompson, because her husband told her so, to whom she was married about thirteen months after the death of her husband, and to whom she delivered said note with everything else she had when she married him and whom she authorized to collect said note. George W. Thompson and other witnesses testify that only a portion of said note was paid. The note is not produced, but its absence is accounted for by the statement of Thompson that he sent it to Maxwell at his request to have a credit endorsed and that he never got it back. It does not appear that Maxwell refused to return it. The weight of the evidence is found to be that at the beginning of the Maxwell Company suit a considerable sum, but how much cannot be ascertained, remained unpaid on the note. It also appears that Maxwell was at all times after the making of the note a man of ample financial responsibility. It does not appear that any part of the proceeds of said note was paid to the children of Alfred Bent or their mother,

but George W. Thompson supported, maintained, and educated them during their minority after his marriage to their mother with the funds of his wife and himself the same as his own children, keeping no separate accounts.

Upon the execution and delivery of the deeds by Guadalupe Bent, guardian *ad litem*, and the adult complainants, May 3rd, 1866, Aloys Scheurich and his wife assumed for complainants in said original suit payment of the fees of their counsel therein and paid the same, the amount thereof being included in the note of Maxwell

133 given to Scheurich's wife and the *pro rata* amount thereof being deducted from the other two notes given to Guadalupe Bent and Mrs. Hicklin in equal proportions. There is no evidence that such counsel or other counsel were afterwards retained by Scheurich or other of said complainants, and the record of the said decree of September, 1866, does not disclose what attorney appeared or assumed to appear for the complainants in said cause and consented to the making of said order.

The inventory of the property left by Alfred Bent and filed March 6th, 1867, by Guadalupe Bent, as administratrix, in the probate court shows that outside of the real estate and the note received from Maxwell the total assets of the estate were \$1,408. The debts mentioned in the will of Alfred Bent, together with additional claims against the estate admitted and allowed in the probate court, amounted to \$2,423; but witnesses familiar with said Bent's affairs testify that at the time of his death he had both real and personal property, other than that inventoried, both in New Mexico and in Colorado.

And the court makes and certifies the foregoing statement and findings as the facts proven and established by the evidence in each of said causes, and orders that the same be incorporated in the record as part thereof.

THOMAS SMITH,
Chief Justice.

Filed October 15th, 1895. Geo. L. Wyllys, clerk. (Findings of fact.)

133½ And afterwards, to wit, on the 23rd day of November, 1895, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an affidavit of value in said cause; which said affidavit was and is in the words and figures following, to wit:

133½ In the Supreme Court of New Mexico.

CHARLES BENT *et als.*, Plaintiffs and Appellants,

vs.

THE MAXWELL LAND GRANT & RAILWAY COMPANY *et als.*, Defendants and Appellees.

I, Sol H. Jaffa, being first duly sworn, says on oath: I reside at Trinidad, in the county of Las Animas, in the State of Colorado. I

am engaged in the business of merchandising. Trinidad is not more than ten miles from the northern limit of what is known as the Maxwell land grant, situate partly in Colfax county and partly in Las Animas county, Colorado. I have resided in the same vicinity—some of the time in Colorado and some of the time in New Mexico—for more than twenty years last past. I know the Maxwell land grant before mentioned, the same an interest in which is claimed by the plaintiffs and appellants in this above-entitled cause, and have been acquainted with it for more than twenty years last past. I have been over a good part of the area of the ground, and I believe I am pretty well acquainted with what it contains. A large — of it is grazing land. It contains a great many thousand acres of very valuable timber. Gold mines have been discovered and have yielded large sums and are still being worked. Extensive mines of coal have been opened and are still being worked, and upon the immediate vicinity of the water-courses there is quite a considerable area of irrigable and tillable land. The whole ground is understood to contain, and I should think does contain, not far from two million acres of land. I think I know the boundaries of this grant, and I think this estimate as to the contents of it is not too great. I believe I am acquainted with the value of lands in Colfax county, New Mexico, and Las Animas county, Colorado, according to the current-going market prices thereof, and I am confident that an undivided one-twelfth part of this grant is worth not less than three hundred & seventy-five thousand dollars. I am not a party to this litigation nor in any way interested therein.

SOL H. JAFFA.

133 $\frac{1}{2}$ Subscribed and sworn to before the undersigned, a notary public in and for the county of Las Animas, at the said county of Las Animas, in the State of Colorado, this 18th day of November, A. D. 1895.

WILLIAM LITTLEFIELD,

[SEAL.]

Notary Public.

My commission expires May 19th, 1896.

134 And afterwards, to wit, on the 12th day of November, 1895, there was filed in the office of the clerk of said supreme court of the Territory of New Mexico an affidavit of the value of the property involved in said suit; which said affidavit is in the words and figures following, to wit:

In the Supreme Court of New Mexico.

CHARLES BENT <i>et als.</i> , Plaintiffs and Appellants,	}
<i>vs.</i>	
THE MAXWELL LAND GRANT & RAILWAY COMPANY <i>et als.</i> , Defendants and Appellees.	

Albert W. Archibald, being first duly sworn, says on oath: I reside at Trinidad, in the county of Las Animas, in the State of Colo-

rado, and have resided there and in that part of Colorado since about the year 1861. During a considerable part of that time I have followed the business of land surveying. I believe I am well acquainted with what is known as the Maxwell land grant, lying partly in Las Animas county, Colorado, and partly in the county of Colfax, in the Territory of New Mexico, and have been acquainted with that tract since about the year 1858. I have frequently visited the grant and have traveled over a very considerable part of its area. I think I am acquainted with the character of the surface, its products and capabilities. A very large part of the ground is good grazing ground and has probably no other value. A considerable part of it—the most part of it along the streams—is cultivated and is valuable for cultivation. I cannot say with confidence the area of irrigable land within the grant, but I think it certainly is not less than fifty thousand acres. A very large part of the grant is covered with forests of pine and spruce timber, valuable for the manufacture of lumber, railway ties, and other like purposes. Near Elizabethtown valuable mines of gold and silver were discovered as long ago as 1867 and were worked for several years, yielding large values in gold and silver; they have not been extensively worked of late years, but it is not believed that they have been exhausted. Very extensive mines of coal are found upon the grant, and these coal mines have been worked for more than ten years last past, yielding large quantities of coal. I believe I know the boundaries of the grant and am sufficiently acquainted with it to fix its value. I am satisfied that an undivided twelfth part of this grant is at this time worth not less than three hundred and fifty thousand
135 dollars. In the present times there is no active market for real property, and it is difficult to estimate the value of so extensive a tract as this, because purchasers of so extensive a tract are not often found, but I make this estimate as to what I think the ground ought to bring if a purchaser could be found willing to pay a reasonable price.

ALBERT W. ARCHIBALD.

Subscribed and sworn to before the undersigned, a notary public in and for the county of Las Animas, at the said county of Las Animas, in the State of Colorado, this ninth (9th) day of November, A. D. 1895.

[SEAL.]

E. BRIGHAM,
Notary Public.

My commission expires Aug. 28, 1898.

And be it further remembered that on the ninth day of October, 1895, there was filed in the office of the clerk of the supreme court of New Mexico the opinion of said court in said cause; which said opinion is hereto annexed, in accordance with rule 8 of the Supreme Court of the United States, and is in the words and figures following, to wit:

136 In the Supreme Court, Territory of New Mexico.

CHARLES BENT *et als.*
vs.
 GUADALUPE MIRANDA *et als.* } No. 579. Appeal from Colfax County.

Statement of Facts.

For a full statement of the bill in this case, which is very lengthy, reference is made to the case of Bent *v.* Maxwell L. G. & R'y Co., 3 N. M., 158; 3 Pac., 721.

The Maxwell Company answered, denying all allegations of fact made in the bill, except what appears of record; that the decree of September, 1866, was erroneous and void, or that the decree of June, 1865, vested in the Bent heirs a legal estate, but avers it was merely interlocutory. It avers the fairness of the alleged compromise agreement, and that the price paid was a liberal one, and denies all fraud, imposition, or error, as charged.

The testimony showed that the decree of June, 1865, was obtained during the lifetime of Alfred Bent, and that prior to his death negotiations for a sale of his interest and that of his two sisters, which had been declared by said decree, were pending; that subsequent to his death these negotiations were resumed, one Aloys Sheurick, the husband of one of said sisters, conducting the negotiations; that on May 3rd, 1866, the negotiations eventuated in a deed being executed by said sisters and their husbands and Guadalupe Bent, mother of complainants, as guardian *ad litem* for them, conveying, upon a consideration of \$18,000, all their interests to L. B. Maxwell in the Beaubien and Miranda grant, the property in controversy.

There are various estimates given in the testimony as to the value of said interests, based upon a valuation per acre of the land in said grant from two and one-half cents to one dollar and twenty-five cents, many witnesses saying that there was no market value whatever to such lands at that time, and there is other testimony showing that other interests in the grant were purchased from persons

137 *sui juris* at a less rate than the Bent heirs obtained, and that such were ordinary business transactions at that date. Apart from the testimony to the effect that Maxwell was a man of great influence; that he was determined, resolute, and unscrupulous; that he made threats that no one should occupy any part of his land, and that people at that time had no desire to oppose any of his wishes as to anything he desired to accomplish; there is nothing from which there might be gathered any suggestion of fraud or imposition whatever. It is shown that the solicitors advised the settlement, and that Sheurick, parting with his wife's interest on the same terms, also advised it. There is some testimony also that Maxwell misrepresented to Sheurick the extent of said grant, saying that it only went to the north boundary of New Mexico, when in fact it extended into Colorado, and it is also shown that at that time also the line of New Mexico was thought to extend much farther

north than it was afterwards determined to be, and it was not made very clear whether this was a material misstatement or not.

The recitals in the bill sufficiently refer to all documentary evidence necessary to an understanding of the case.

Opinion of the Court.

COLLIER, A. J.:

At the threshold of this case arise important questions:

1. Is the decree of June, 1865, interlocutory or final?

2. If interlocutory, is it so in a limited sense, as specified in the decree, or upon the whole merits?

The discussion of the question as to whether a decree is final or interlocutory in its nature arises generally, or we might say almost universally, upon motions to dismiss in appellate tribunals for alleged prematurity of appeal. It would certainly be true that if a decree was final in the sense that it has become appealable, it would also be final in every other respect and as to all matters it adjudicates, but is the contrary true, that a decree which is not appealable because interlocutory is interlocutory as to everything decided by it?

The decisions of the Supreme Court of the United States upon the question of finality of decrees proceed, not only upon the theory of their being appealable or not, but also they are direct authority (as a general rule) only upon the construction of the act of Congress allowing appeals from the United States district and circuit
138 courts from final judgments. There is, however, no special significance to be attached to this fact, as decrees final in the same sense are appealable only in this Territory, or at least such seems to be conceded by counsel for appellants and appellees, but that statement is pertinent in view of the fact that the United States Supreme Court will refuse to dismiss an appeal as to a decree claimed to be interlocutory solely because the supreme court of a State has held it to be appealable.

W. & B. B. Co. v. W. B. Co., 138 U. S., 287.

As to whether a decree is final, so as to be appealable, is said by Justice Brown, in *McGourkey vs. Toledo & Ohio R'y*, 146 U. S., 536, to have been of more frequent discussion in that court than any other question of equity practice, and that it must be conceded that the cases are not altogether harmonious.

As favoring their view, that this decree is final as to the merits of the controversy, even to the extent of being appealable, appellants cite *Forgay vs. Conrad*, 6 How., 201, and the cases of *Thompson vs. Dean*, 7 Wall., 342, and *Winthrop Iron Co. vs. Meeker*, 109 U. S., 180, in which the doctrine laid down in *Forgay vs. Conrad*, *supra*, is expressly reaffirmed. Other cases speak of the case of *Forgay vs. Conrad* being exceptional, some saying the peculiar circumstances and the certainty of irremediable injury ensuing, if an appeal could not be taken from a decision in which the whole question had been adjudicated, because of there being a reference to a master in which

further action must be taken by the court in the matter of an account, should have made it appealable, and some that it was only sustainable upon the theory of execution being awarded. The other line of decisions which appellees have cited to sustain their contention that this is an interlocutory decree begins, strange to say, with the case of *Perkins vs. Fourniquet*, 6 How., 206, which immediately succeeds *Forgay v. Conrad*, *supra*, the opinions in both cases being from the pen of Taney, C. J.

While in some respects the decree in *Perkins vs. Fourniquet* more resembles the one at bar than does that in *Forgay vs. Conrad*, there is a similarity in the decree here and in *Forgay vs. Conrad*, in the fact that in both the decree recites that the bill is retained for a limited purpose, here as to the partition and there as to the adjusting of accounts. The dissimilarity in this respect from the decree in *Perkins vs. Fourniquet* is marked, in that in it all matters "are reserved until the incoming of the master's report."

139 In *Pulliam vs. Christian*, 6 How., 209, next succeeding *Perkins vs. Fourniquet*, it was held that a decree setting aside a deed and ordering the property delivered to a commissioner of the court to take an account and "report all matters necessary to a final decree" was "final only as to the trust deed," but, not being final as to the whole matter in controversy, the appeal was dismissed. Other cases, beginning with *Craighead vs. Wilson*, 8 How., 201, say "that to authorize an appeal a decree must be final in all matters within the pleadings so that an affirmance of the decree will end the suit." These citations represent quite completely the positions arising in discussions as to whether or not a decree is final so as to be appealable. Tested by the rule stated in *Craighead vs. Wilson*, *supra*, it would seem that this decree was not final so as to be appealable, because the pleadings certainly embraced two matters, one the establishing of the interest claimed and the other the partition sought by the bill.

The bill in *Perkins vs. Fourniquet*, as it sought the establishment of a certain interest in real estate and partition, is very like the case at bar. We think it would be a profitless task to enter upon a discussion to reconcile cases which later decisions of the United States Supreme Court say are not entirely harmonious, but we hold that the decree of June, 1865, was not final so far as to be appealable, thus following what we conceive to be the rule in *Craighead vs. Wilson*, *supra*.

There recurs, then, the question as to whether it was final in the sense that it could not be vacated in the court where rendered after the term at which it was rendered, the decree reciting on its face that "the court now reserves and suspends making its decree as to the partition and payment of the costs until a future term of this court." Upon this point appellee again cites *Perkins vs. Fourniquet*, *supra*, as later reported in 16 How., 82. In the first decision Chief Justice Taney, delivering the opinion there, said that "these interlocutory orders and decrees remain under control of the circuit court and subject to their revision," and the circuit court did at a subsequent term, in fact, reconsider its opinion, and, finding that

there was no equity in the bill, dismissed same, it formerly holding precisely to the contrary, and in 16 How., 82, Taney, C. J., again rendering the opinion, this was held to be proper, and that 140 if the court discovered itself to be in error it had the right to correct the error. This case certainly seems to establish the principle counsel for appellees contend for. It is true that the first decree decided to be interlocutory did in terms say that all matters "are reserved until the incoming of the master's report;" but that clause did not appear to weigh in the mind of the court, but the right appears to be proclaimed that prior to the time the right to take appeal began the case should be rightly decided upon all issues, notwithstanding a prior erroneous adjudication. There are expressions in the opinions of the court in other cases which appear to militate against this view, as, for instance, in *Fulliam vs. Christian*, 6 How., 209, the court say this decree "is final only as to the trust deed," but, not being final as to the whole matter in controversy, "is not appealable." In *Beebe vs. Russell*, 17 How., 283, the court say, in discussing *Forgay vs. Conrad*, *supra*, that it was "doubtful if the lower court could in any way control or qualify its antecedent decree upon the whole merits except upon a petition for a rehearing."

These chance expressions should not, it appears to us, weigh against the effect of the decision in 16 How., 82, *supra*, and we therefore hold that the decree was interlocutory and subject to be set aside at a future term of the court merely because it was up to that time not appealable.

This brings us to the contention of counsel for appellants that the decree of September, 1866, showing upon its face that the consent upon which it was based was not a legal consent so far as these complainants are concerned. It was merely a modification of the prior decree *pro tanto*—that is to say, so far as the adult complainants were interested it was entirely abrogated, and so far as the infants were affected it dismissed only the partition part of the former decree, if even it did that much.

The position taken by appellants' counsel in their brief that "every presumption of law is in favor of the validity of a judgment by a court of competent jurisdiction, and the jurisdiction to render a particular judgment is supported by like presumption, except when the want of jurisdiction appears on the face of the record," and for which they cite a number of cases, we believe to be well founded in law.

We come, then, to the point as to whether or not the recital 141 in the decree of September, 1866, of consent as affecting these complainants, they being minors and represented by their mother as guardian *ad litem*, of itself invalidates the decree of September, 1866. Our holding that the decree of June, 1865, was merely an interlocutory decree and subject to revision at a subsequent term of the district court carries the conclusion that the suit in which they were complainants was at the time of the September, 1866, decree a suit pending with nothing in it that was *res adjudicata*. Appellees claim that under such circumstances it was open to com-

promise, and that also the interest claimed, whatever might be said as to the effect of a final decree establishing it, was then at all events merely an equitable estate. Taking these propositions in inverse order, we think it is manifest that prior to final decree the legal estate was in Beaubien and Miranda, the grantees of the Mexican government, and that prior to final decree establishing their interest complainants had nothing more (if anything) than an equitable estate. As clearly stated in *Cochran vs. Van Sorley*, 20 Wend., 376, "it is a settled principle that whenever the property of infants consists of real or personal estate, the legal title to which is in trustees, the chancellor, as the general guardian and protector of the rights of all infants, may authorize such a disposition thereof as he in the exercise of a sound legal discretion may deem most beneficial for the infants." In *Woods vs. Mathew*, 38 Barb., 473, and *Anderson vs. Mathew*, 44 N. Y., 260, it is said that "upon principle and authority a court of chancery has power to sell equitable interests of infants, and that such power is inherent and independent of statutory authority."

We hold, therefore, that the interest of these complainants being at the date of the September, 1866, decree an interest claimed in a pending suit, equitable in its nature and sought to be established, according to the contention of appellant's counsel, as a legal estate, and the decree adjudicating it not being yet final, but interlocutory and under the control of the court, there was legal discretion and jurisdiction in the district court to dispose of it for a money consideration, if deemed for the best interests of the infant complainants.

Shall it then be said that because the decree professes as its basis "consent, when the complainants were not *sui juris*, vitiates
142 it, when, if the consent had not been stated, the decree would be upheld by every presumption of law and fact? We think not, but that a fair construction would be that the court considered it beneficial to the interests of these minor complainants, and for that reason the decree was entered, and the recital of the consent and agreement were merely incidents of the transaction, the law finding a basis for the decree in the discretion of the chancellor exerted in the infant's behalf.

It is stated in *Kingsbury vs. Buckner*, 134 U. S., 680, that "a guardian *ad litem* cannot bargain away the rights of the infant he represents, but he can assent to such arrangements as will facilitate the determination of a suit." It is also said that "it is the duty of the court to protect the interests of infants and see that they are not bargained away by those assuming to represent them."

In *Taylor vs. Franklin Savings Bank*, 50 Fed. Rep., it is stated to be well settled that "infants can by an original bill in the nature of a bill for review attack any decree entered against them during their infancy and have it set aside for fraud or error in fact."

This case is essentially like the case at bar in one respect, viz., the decree was entered upon a settlement and compromise made between a foreclosing bank and the guardian *ad litem* of infant defendants, and the court say, "It may be, and probably is, true that

so long as this decree is allowed to stand it is binding by its terms on the infant defendants;" and then, after announcing, as above, the rights of attack by them for fraud or error of fact, the decree was held to be successfully impeached for fraud and was set aside. There was no pretence in that case that the settlement and compromise by the guardian *ad litem* vitiated of itself the decree, but it must have been taken by the court as advisory and was held unauthorized and inequitable because of the suppression of facts known to the plaintiff.

We hold, therefore, that the mere statement on the face of the decree that there was consent does not operate to show it was based on that alone, and that it will be presumed there was a reasonable exercise of discretion, intended for the benefit of said minors.

The United States Supreme Court, in *Thompson vs. Maxwell*, 95 U. S., 398, has said that this "decree for carrying out a settlement and compromise of a suit is certainly not of itself erroneous. When made by consent it is presumed to be made in view of existing facts, and that these were in the knowledge of the parties. In the absence of fraud in obtaining it such a decree cannot be impeached."

Thus we are brought to the question as to whether there was fraud in obtaining the decree.

We do not enter into a discussion at large of the testimony by which it is claimed that the decree of September, 1866, is successfully impeached upon the ground of fraud, and while we are not prepared, in view of the testimony submitted since the decision in *Thompson vs. Maxwell*, 95 U. S., 400, to say that "the proofs show a case which, in our own judgment, supports the conclusions of the decree to the effect that the terms of the compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants and were so considered and accepted by the court in their behalf," we do hold that the judgment of the court at that time in so considering and accepting said terms was shown to be a fair and reasonable exercise of the chancellor's discretion, and that no fraud, imposition, or error has been shown to have entered into said transaction or to have brought about said compromise decree.

It is claimed by appellants that there has been a decision of this court, *Bent vs. Maxwell L. G. & R'y Co.*, 3 N. M., 158, which is the law of the case, and that in and by said decision it was held that the decree of June, 1865, vested in Alfred Bent a legal estate, which descended to complainants, which legal estate there was no authority in the chancellor to dispose of by sale as and by the decree of September, 1866.

From a careful reading of the bill filed in this cause, it does not appear that this portion of the opinion delivered by the court in *Bent vs. Maxwell L. G. & R'y Co.* was at all necessary to the disposition of the demurrer which had been interposed. Indeed, following upon the announcement of the court that the bill states "facts sufficient to warrant the interference of a court of equity in their behalf, and that under the authorities cited they have properly

brought their bill in the form of an original bill to impeach the decree complained of on the grounds of fraud, imposition, and error,"

Bell, A. J., *arguendo*, states what is relied — by appellant's
144 counsel as determining the law of the case, viz., that this was a legal estate established by the decree of June, 1865, and the district court had no authority to order its sale. This announcement was essentially — dictum, and if correct, as stating abstract principles of law, has, in our view, no application to this case, the decree of June, 1865, not being final, but interlocutory, and the equitable interest of Alfred Bent not having been conclusively established by a final decree in the district court.

Other questions around which have been thrown a wealth of learning and research, such as befits the ability of counsel engaged and the magnitude of the interests involved, we deem it unnecessary to advert to, as the views we have expressed are sufficient for a disposition of the cause adversely to appellants.

It is the opinion of the court that the decree of the district court in and for the county of Colfax dismissing said bill of complaint ought to be affirmed, and it is accordingly so ordered. It is further ordered that this cause be remanded to said lower court with directions to carry said decree into effect.

N. C. COLLIER,
Associate Justice.

We concur.

_____,
Chief Justice.

_____,
Associate Justice.

N. B. LAUGHLIN, A. J.,
Associate Justice.

H. B. HAMILTON, A. J.,
Associate Justice.

GIDEON D. BANTZ,
Associate Justice.

145 TERRITORY OF NEW MEXICO, {
County of Santa Fé, Supreme Court. }

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a full, true, and perfect transcript of such portions of the record in said cause as said appellants deem necessary for review in the Supreme Court of the United States as the same remain on file and of record in my office.

Witness my hand and the seal of said court, at Santa Fé, New Mexico, this 15th day of November, A. D. 1895.

[Seal Supreme Court, Territory of New Mexico.]

GEO. L. WYLLYS, *Clerk.*

CHARLES BENT *et als.*

vs.

GUADALUPE MIRANDA *et als.*

Appeal from Colfax district court.

Be it further remembered that on the 9th day of November, A. D. 1895, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a certain bond in appeal herein, then and there duly approved by the Honorable N. B. Laughlin, one of the judges of the said supreme court, and which said bond, with the approval aforesaid thereunder written, was and is in words and figures as follows, to wit:

"Know all men by these presents that we, Charles Bent, Julianio Bent, Alberto Silas Bent, as principals, and C. F. Remsburg and E. D. Wight, as sureties, are held and firmly bound unto Guadalupe Miranda, Jesus G. Abreu, as surviving executor of the last will of Charles Beaubien; Luz B. Maxwell, Petra Abreu and Jesus G. Abreu, her husband; Juana Clothier and Joseph Clothier, her husband; Pablo Beaubien, Virginia Keyes and — Keyes, her husband; Peter Maxwell, Amelia Abreu and — Abreu, her husband; Sophia Jaramillo, Pablito Maxwell, Odila Maxwell, Benigna Mares and Vicente Mares, her husband; the Unknown Heirs of Joseph Pley, deceased; Estefana Hicklin, Teresina Scheurick, Aloys Scheurick, her husband; Guadalupe Thompson, the Maxwell Land Grant & Railway Company, the Unknown Heirs of Leonora Trujillo and of Frederick Miller and Teodora Miller, his wife; the Maxwell Land Grant Company, Cyrus W. McCormick, and James M. Walker in the full and just sum of five hundred dollars (\$500), to be paid to them, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this ninth day of November, A. D. 1895.

Whereas lately, at the July, 1895, term of the supreme court of the Territory of New Mexico, in a certain suit in the said court depending between the above-bounden Charles Bent, Julianio Bent, Alberto Silas Bent, as plaintiffs and appellants, and the said Guadalupe Miranda, Jesus G. Abreu, as surviving executor of the last will of Charles Beaubien; Luz B. Maxwell, Petra Abreu and Jesus G. Abreu, her husband; Juana Clothier and Joseph Clothier, her husband; Pablo Beaubien, Virginia Keyes and — Keyes, her husband; Peter Maxwell, Amelia Abreu and — Abreu, her husband; Sophia Jaramillo, Pablito Maxwell, Odila Maxwell, Bernigna Mares and Vicente Mares, her husband; The Unknown Heirs of Joseph Pley, deceased; Estefana Hicklin, Teresina Scheurick, Aloys Scheurick, her husband; Guadalupe Thompson, The Maxwell Land Grant & Railway Company, The Unknown Heirs of Leonora Trujillo and of

Frederick Miller and Teodora Miller, his wife ; The Maxwell Land Grant Company, Cyrus W. McCormick, and James M. Walker, defendants and appellees, a decree was rendered against the said Charles Bent, Julianio Bent, and Alberto Silas Bent, and the said Charles Bent, Julianio Bent, and Alberto Silas Bent having prayed an appeal from the said decree to the Supreme Court of the United States :

148 Now, the condition of this obligation is such that if the said Charles Bent, Julianio Bent, and Alberto Silas Bent shall prosecute their appeal to effect and answer all costs if they fail to make good their plea, then the above obligation to be void ; else in full force and virtue.

CHARLES BENT.
JULIANO BENT.
ALBERTO SILAS BENT.
C. F. REMSBERG.
E. D. WIGHT.

[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]

Witness as to signatures of Charles Bent, Julianio Bent, and Alberto Silas Bent :

GEORGE W. THOMPSON.

Witness as to C. F. Remsberg and E. D. Wight's signatures :
M. R. FORBES.

Approved :

N. B. LAUGHLIN,
Judge Supreme Court, New Mexico.

Approved :

[SEAL.] GEO. L. WYLLYS,
Clerk Supreme Court, Territory of N. Mex."

Be it further remembered that afterwards, to wit, on the 30th day of November, A. D. 1895, there *was* filed in the said supreme court certain assignments of error herein in the appeal of the said appellants to the Supreme Court of the United States, and the original of which said assignments of error *are* hereto attached :

149 TERRITORY OF NEW MEXICO :

In the Supreme Court.

I, George L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a true, perfect, and correct transcript of the portions of the record of the cause therein mentioned which are therein set forth, to wit, the appeal bond, and that the paper hereunto attached is the original of the assignments of error in the appeal of the appellants in said cause to the Supreme Court of the United States, which were also filed in my office.

In witness whereof I have set my hand and the seal of said court this 30th day of December, A. D. 1895.

[Seal Supreme Court, Territory of New Mexico.]

GEO. L. WYLLYS, *Clerk.*

150 In the Supreme Court of the United States.

Appeal from the supreme court of the Territory of New Mexico.

CHARLES BENT, JULIANO BENT, ALBERTO SILAS BENT, Plaintiffs
and Appellants,
vs.

GUADALUPE MIRANDA, JESUS G. ABREU, as Surviving Executor of the Last Will of Charles Beaubien; Luz B. Maxwell, Petra Abreu and Jesus G. Abreu, Her Husband; Juana Clothier and Joseph Clothier, Her Husband; Pablo Beaubien, Virginia Keyes and — Keyes, Her Husband; Peter Maxwell, Amelia Abreu and — Abreu, Her Husband; Sophia Ramillo, Pablito Maxwell, Odila Maxwell, Bernigna Mares and Vicente Mares, Her Husband; The Unknown Heirs of Joseph Pley, Deceased; Estefana Hicklin, Teresina Scheurick, Aloys Scheurick, Her Husband; Guadalupe Thompson, The Maxwell Land Grant & Railway Company, The Unknown Heirs of Leonora Trujillo and of Frederick Miller and Teodora Miller, His Wife; The Maxwell Land Grant Company, Cyrus W. McCormick, and James M. Walker, Defendants and Appellees.

And the said appellants come now and say that in the record and proceedings of the supreme court of the Territory of New Mexico and in the final decree of the said supreme court manifest error hath intervened in this, to wit:

First. The decree of the supreme court of the Territory of New Mexico affirms the decree theretofore given in the district court in and for the county of Colfax, in said Territory, whereas in the decree of the said district court manifest error intervened, to the prejudice of the said appellants, and decree ought to have been given in the supreme court of the Territory of New Mexico reversing and annulling the decree so given in the district court.

151 Second. Also in this, to wit, that the facts found and declared by the supreme court of the Territory of New Mexico are not sufficient to sustain the decree given in the district court of the county of Colfax aforesaid nor the decree of affirmation thereof given in the supreme court of the Territory of New Mexico, but, on the contrary thereof, upon the facts found by the said supreme court of the Territory of New Mexico, the decree given in the district court of the said county of Colfax ought to have been reversed, annulled, and in all things held for naught.

Third. Also in this, to wit, that in and by the said record and proceedings it doth appear that by a certain final decree made and given in the district court in and for the county of Taos, in the Territory of New Mexico, on the 3rd day of June, 1865, Alfred Bent,
12—388

ancestor of the now plaintiffs and appellants, was vested with one undivided twelfth part and share in the premises named in the bill of complaint of plaintiffs in the district court of the said county of Colfax, and the decree afterwards, at the September term, 1866, given in the said district court in and for the county of Taos, assuming to vacate, annul, and set aside the final decree given on the 3rd day of June, 1865, was and is erroneous and void as against appellants, and decree ought to have been given in the district court in and for the said county of Colfax according to the prayer of the complaint of these plaintiffs in the said district court, whereas in and by the judgment and opinion of the said supreme court the final decree of June 3rd, 1865, so given in the district court of the said county of Taos, was declared to be interlocutory, and, further,

152 in and by the judgment, decree, and opinion of the supreme court of the Territory of New Mexico it is declared that the said decree entered at the September term, 1866, of the said district court in and for the county of Taos, assuming to vacate, annul, and set aside the said former decree of the district court upon the consent merely of parties, not showing or setting forth who assumed to the said court to represent or consent for the now plaintiffs and appellants in that behalf, and no evidence being heard touching the matter, was and is nevertheless effectual to vacate, annul, and set aside such former decree in favor of plaintiffs' ancestor, the said Alfred Bent.

Fourth. It appears by the record and proceedings of the said supreme court that by a certain former decree and opinion rendered and given in this same suit, in the said supreme court of the Territory of New Mexico, it was found, adjudged, decreed, and declared that by a decree given in the district court in and for the said county of Taos, on the 3rd day of June, 1865, as set forth in the bill of complaint of these plaintiffs herein, there was vested in Alfred Bent, ancestor of these plaintiffs, a legal estate in the undivided one-twelfth part in the lands in the said bill of complaint mentioned, and that the decree given in the said district court in and for the said county of Taos, at the September term, A. D. 1866, thereof, assuming and pretending to vacate and set aside such former decree in the said district court, was wholly erroneous and void; nevertheless, the said supreme court of the Territory of New Mexico, by the decree and opinion rendered and given herein, at the July term thereof last past, doth in effect find, declare, and adjudge that

153 the decree so given in the district court in and for the said county of Taos, at the September term, 1866, was effectual to vacate, annul, and set aside such prior decree of the said district court in and for the said county of Taos.

154 Wherefore, for the errors aforesaid and the manifold other error- in the said record of proceedings and in the decree of the said supreme court of the Territory of New Mexico appearing, the said Charles Bent, Alberto Silas Bent, and Julianio Bent pray that the decree of the supreme court of the Territory of New Mexico and the decree given herein in the district court in and for the county of Colfax may be reversed, annulled, and altogether held for

naught, and that plaintiffs be restored to all things which by virtue thereof they have lost, and they also pray that decree be given for their costs in this behalf expended. .

CALDWELL YEAMAN,
E. T. WELLS,
R. T. McNEAL,
JNO. G. TAYLOR,

Solicitors for Appellants and of Counsel.

[Endorsed:] Filed in my office this Nov. 30, 1895. Geo. L. Wyllys, clerk.

Endorsed on cover: Case No. 16,110. New Mexico Territory supreme court. Term No., 388. Charles Bent, Julianio Bent, & Alberto Silas Bent, appellants, *vs.* Guadalupe Miranda, Jesus G. Abreu, as surviving executor of the last will of Charles Beaubien; Luz B. Maxwell, *et al.* Filed December 9, 1895.

*Brief of Carlisle, Wells and
McNeal for Appellants.*

The Supreme Court of the United States.

Filed Oct. 12, 1897.

Guadalupe Thompson, Administratrix of the Estate of
Alfred Bent, deceased; George Thompson, her
husband; Charles Bent, Julian Bent and
Alberto Silas Bent.

Appellants.

vs. (No. 387.)

The Maxwell Land Grant & Railway Company, and
Luz. B. Maxwell.

Appellees.

AND

Charles Bent, Julian Bent and Alberto Silas Bent.

Appellants.

vs. (No. 888.)

Guadalupe Miranda; Jesus G. Abreu, as Surviving
Executor of the last Will of Charles Beaubien;
Luz. B. Maxwell, *et. al.*

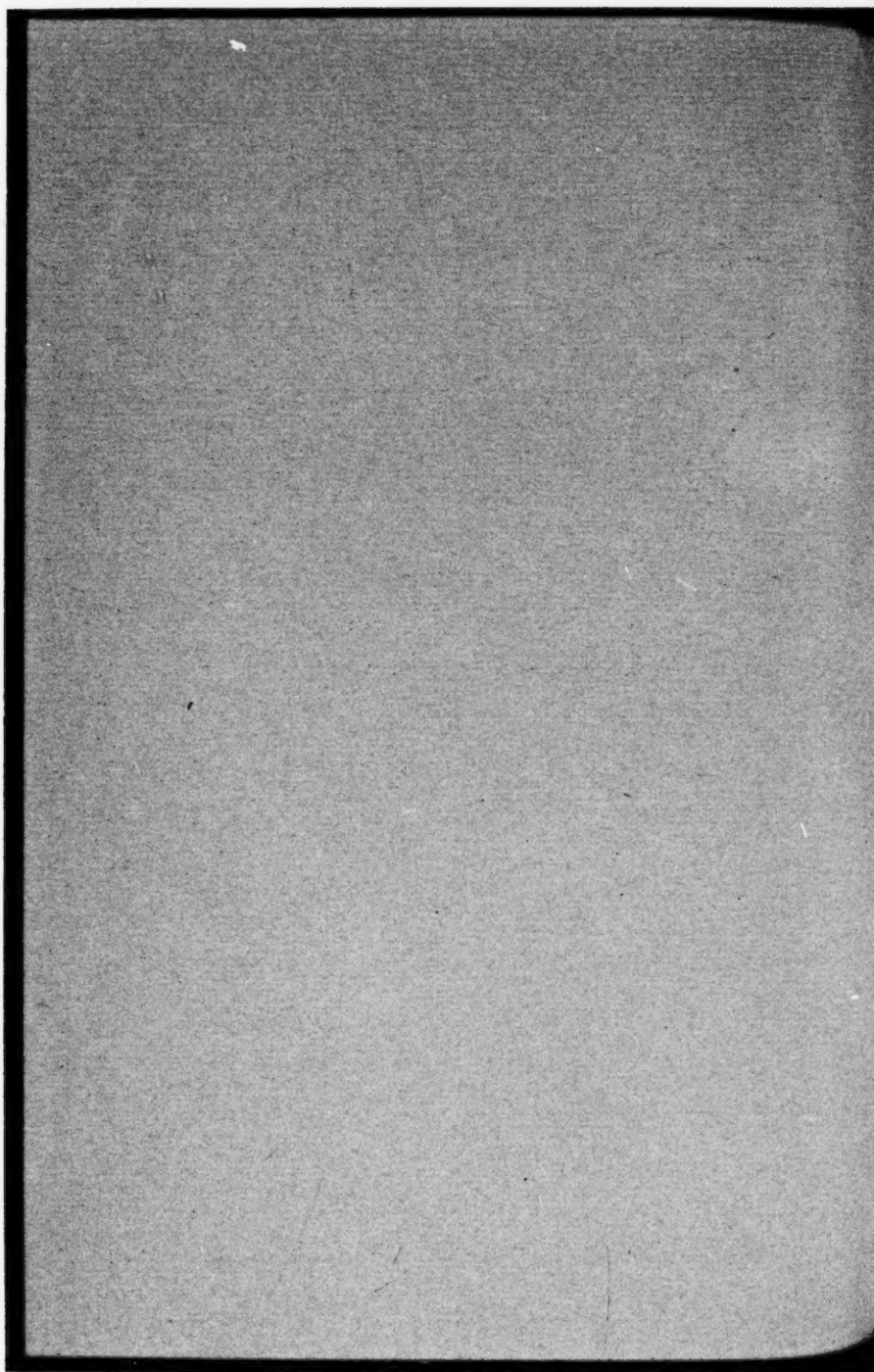
Appellees.

BRIEF FOR APPELLANTS.

S. D. ROUSE,
For Appellants.

JOHN G. CARLISLE,
JAMES O'HARA,
CALDWELL YEAMAN,
E. T. WELLS,
R. T. MCNEAL,
JOHN G. TAYLOR,

Of Counsel.



The Supreme Court of the United States.

Guadalupe Thompson, Administratrix of the Estate of
Alfred Bent, deceased; George Thompson, her
husband; Charles Bent, Julian Bent and
Alberto Silas Bent.

Appellants.

vs. (No. 387.)

The Maxwell Land Grant & Railway Company, and
Luz. B. Maxwell.

Appellees.

AND

Charles Bent, Julian Bent and Alberto Silas Bent.

Appellants.

vs. (No. 388.)

Guadalupe Miranda; Jesus G. Abreu, as Surviving
Executor of the last Will of Charles Beaubien;
Luz. B. Maxwell, *et. al.*

Appellees.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

By agreement of Counsel, Cases Nos. 387 and 388 are to be heard together.

Case No. 387 has been to this Court on appeal once before and is reported in 95, U. S. p. 391, where the history of the case is set out in full. The decision of this Court reversed that of the Supreme Court of the Territory of New Mexico, from which Court the appeal had been prosecuted, and after the reversal the case went back to the Supreme Court of the Territory and then to the District Court for the County of Colfax, where it originally began.

By the amendments to the bill of complaint then filed and the answers thereto, practically the same questions were raised as in Case No. 388, a statement of which case is as follows :

Where reference is made to the Record herein, it is to the Record of Case No. 388.

On the 11th day of January, 1841, the Government of Mexico granted to Charles Beaubien and Guadalupe Miranda a tract of land lying in the Territory of New Mexico specifically described in the Appellants bill of Complaint herein, page 2 of the Record, containing about two million acres.

Subsequently, this grant was confirmed unto the grantees named, by the United States Government, by an Act of Congress approved on the 21st day of June, 1860, entitled "An Act to confirm certain private land claims in the Territory of New Mexico."

In 1859, Alfred Bent, and his two sisters Estefana and Teresina, together with Alexander Hicklin, the husband of Estefana filed a bill in Chancery (p. 46, Record) in the District Court of New Mexico for the County of Taos, against Charles Beaubien, Guadalupe Miranda, Lucien B. Maxwell and Jose Pley, in which bill, the complainants claimed that their father Charles Bent, deceased, at the time of his death was jointly interested with Beaubien and Miranda in the grant of land referred to above, and that he was justly entitled to one-third part thereof, and they pray that their right to a third part of said grant may be established, and that they may have partition of same. Maxwell and Pley were alleged to have acquired some interest in the grant, claiming under said Beaubien and Miranda. The prayer of the bill was as against all the Defendants that the title of the said Charles Bent, to the one-third part thereof might be established, and that a partition might be had.

In that suit on the 3rd day of June, 1865, a decree was made establishing the Bents title to an undivided fourth part of the land, the right of succession of the Complainants, and directing a partition.

Commissioners were appointed by the decree, and ordered to report at the next term. The Court reserving its "decree as to the partition and payment of the costs in the cause until a future term of this Court." (Decree is found on page 16, Record.)

Subsequent to the decree of June 3rd, 1865, some negotiations were entered into between Maxwell, who had acquired the principal interest in the property and the Bents, looking to a purchase by Maxwell of the Bents interest.

Alfred Bent, one of the Complainants died December 15th, 1865, leaving a widow, Guadalupe Bent, and three infant children who are the appellants herein, as his only children and heirs. Long afterward, to-wit, in 1867, it appeared that Alfred Bent left a

will, which was probated March 6th, 1867, (p. 64-65, Record.)

In April, succeeding the death of Alfred Bent, an order was entered in the cause suggesting the death of Alfred Bent and making his infant children parties complainant, and continuing the cause, (p. 69, Record.) A few days afterward at the same term the following order was entered:

“By agreement of the parties the continuance of this cause
 “made on a former day of this term of this Court is set aside;
 “and on motion of solicitors for complainants, Guadalupe Bent is
 “hereby appointed guardian *ad litem* and Commissioner in
 “Chancery for the minors of Alfred Bent, in this cause with full
 “power to execute deeds or to carry into execution all sales or
 “transfers made of their interests in and to the real estate
 “therein described to Lucien B. Maxwell, one of Defendants in
 “said cause, and that this cause stand continued until the next
 “term of this Court.”

On the 3rd day of May, 1866, Guadalupe Bent, as guardian *ad litem* of Charles, Julian and Alberto Silas Bent, under the order above quoted, executed a deed of conveyance, (p. 70, record) in fee to the said Maxwell for the one undivided twelfth part of the property in question belonging to the said Charles, Julian and Alberto Silas, heirs of Alfred Bent, deceased.

Estefana Hicklin and Teresina Scheurick, who in the meantime had intermarried with Aloys Scheurick, together with their husbands, executed deeds of conveyance to Maxwell about the same time.

At the September term of the District Court of 1866, this decree was entered, (p. 73, Record.)

“Whereas, an interlocutory decree was rendered at a former
 “term of this Court in the above cause, decreeing one-fourth of
 “the land mentioned in the petition herein to the Complainants
 “in this cause, and appointing Commissioners to divide and set
 “apart the portion so decreed; and whereas, said interlocutory
 “decree was never carried into affect; and whereas since the time
 “of the rendition of said decree, a mutual agreement has been
 “made between the parties to this cause, settling and determining
 “all the equities of the same.

“It is therefore hereby ordered, adjudged and decreed by
 “the mutual consent and agreement of the said Complainants as
 “well as of the said Defendants in the cause, that the interlocutory
 “decree above mentioned, together with all orders made under
 “and by virtue of the same be set aside; and by the mutual
 “consent and agreement of the said parties, it is hereby further
 “ordered, adjudged and decreed that the said Lucien B. Maxwell,
 “one of the Defendants in this cause pay to the said Complainants
 “the sum of \$18,000 to be divided among them *per stirpes*; that
 “is to the said Aloys Scheurick and Teresina Bent, his wife, one
 “third part, and to Alexander Hicklin and Estefana Bent, his

"wife, another third part, and to Charles Bent, Julian Bent and Alberto Silas Bent, the children and heirs of Alfred Bent, deceased, the remaining third part, to be equally divided among the last named, and to be paid into the hands of Guadalupe Bent, widow of the said Alfred Bent, deceased, and guardian *ad litem* for said children, for the purposes of the said division.

"And upon the further consent and agreement of the said parties, it is hereby further ordered, adjudged and decreed that the said Alexander Hicklin and Estefana Bent, his wife, the said Aloys Scheurick and Teresina Bent, his wife, and the said Guadalupe Bent, guardian *ad litem* for Charles Bent, Julian Bent and Alberto Silas Bent, children and minor heirs of the said Alfred Bent, deceased, within ten days from the date of this decree make, execute and deliver to the said Lucien B. Maxwell, good and sufficient deeds of conveyance, of all their rights, title, interest, estate, claim and demand of, in and to the lands in controversy in this cause, the said Guadalupe, guardian *ad litem* as aforesaid, and the said Alexander Hicklin and Estefana Bent, his wife, and the said Aloys Scheurick and Teresina Bent, his wife, in their own names. And by further consent and agreement between the said parties, it is further hereby ordered, adjudged and decreed that the costs of this suit shall be paid, each of the said parties to pay the separate costs in the same, made by themselves."

On the 7th day of April, 1882, the Appellants filed a bill in Chancery, (p. 1, Record), in the District Court for the County of Colfax in the Territory of New Mexico, in which after setting out the facts herein stated they charge that the said Guadalupe Bent, who is a Mexican woman and the mother of Complainants was, at the time of her appointment as guardian *ad litem* of Complainants, and at the time of her said pretended conveyance, and at the time of the entry of the decree complained of, wholly ignorant of the English language, unable to read, write or speak the same; unfamiliar with business, or the proceedings of Courts of law, unacquainted with the rights of Complainants or her duties in that behalf, or the bounds or extent of the grant, or the character or value thereof; ignorant of the confirmation of the grant by the act of Congress aforesaid; and ignorant of the decree of the District Court directing partition of the said grant as hereinbefore set forth; or what part or share in said grant was claimed by Complainants' father in his life time.

And they further charge that the said Guadalupe Bent, was accustomed to consult with and rely upon the said Aloys Scheurick, the husband of Teresina Bent, in reference to her business, property and affairs, and that she reposed special trust and confidence in the said Scheurick.

That the said Maxwell was at that time, and long before that, a man of great wealth, and was possessed of great power and

influence; throughout the County of Taos and the Territory of New Mexico, all of which was at all times well known to Guadalupe Bent, and the said Maxwell well knowing the weakness and ignorance of the said Guadalupe Bent, and her inexperience in matters of business and proceedings in Courts, and her want of information as to the extent, character and value of the said grant, and her ignorance of the act of Congress aforesaid confirming said grant, caused and procured the said Guadalupe Bent to be appointed guardian *ad litem* for Complainants, and procured the said pretended conveyance to be prepared for execution by the said Guadalupe Bent, and caused the same to be written in the English language, and caused and procured the said Aloys Scheurick, to believe and to represent, and said Scheurick by procurement of the said Maxwell, or otherwise, did represent to the said Guadalupe Bent, that the said grant of lands was for the most part fit only for grazing, that the same contained little or no mineral of value, and that the same extended only to the North line of the said Territory of New Mexico, as then constituted, that he, Maxwell, was the owner of the major part of said grant, or was buying or about to purchase the shares and interests of all other owners therein, and might and would control the whole of said grant, and exclude the Complainants from all share or part thereof; that the said Maxwell would pay to said Guadalupe Bent the sum of \$6,000 for the interest of Complainants, that she was authorized to sell and convey said interest, and that unless she should accept the said sum of \$6,000, neither she nor Complainants would ever realize anything for the interest of Complainant.

And Complainants further charge that confiding in these representations, and moved and induced by same and the wealth, power and influence of Maxwell, the said Guadalupe Bent executed the pretended conveyance above set out.

And they further charge that neither at the time of the execution of the said conveyance, nor at any time before that, was the pretended deed of conveyance, read or interpreted or explained to her; that same was executed by her without the advice of Counsel, and that at the time she was wholly ignorant of the extent of the grant, the value thereof and of the rights and shares of Complainants therein, and was believing in all the representations aforesaid; and they further charge that neither then nor at any time thereafter did the said Maxwell pay to said Guadalupe Bent, nor to Complainants, nor any one for them the said \$6,000, although Complainants believe that about the year 1868, the said Maxwell paid to Geo. W. Thompson, who in the year 1867, married the said Guadalupe Bent, some small sums of money, and sundry articles of personal property, much less in value than the said sum of \$6,000, all of which was by said Thompson converted to his own uses, and no part thereof was invested for or applied to the uses of Complainants.

And they further charge that neither at the time of the entry of the decree of September, 1866, nor at any time before that, did the said Guadalupe Bent, nor Counsel nor Solicitor for Guadalupe Bent, nor any other person authorized to agree or consent for Complainants in that behalf, in fact, agree or consent, as in the decree is recited, or agree or consent to the entry of said decree, nor to the vacation or setting aside of the former decree first herein recited; but they charge that the decree of September, 1866, was procured to be entered in the absence of Guadalupe Bent, and without notice to her of any intention to apply therefor. They further charge that it was by reason of the alleged consent and agreement of the said Guadalupe Bent, which she had never in fact given, that the District Court without any reference to the master, and without inquiry or judicial examination as to whether or not said decree would be beneficial to Complainants, gave and entered said decree.

Complainants further charge that consent and agreement of Guadalupe Bent to the decree of September, 1866, if such consent or agreement had in fact been voluntarily or intelligently given or made, would have been wholly ineffectual to bind Complainants, but that said decree, and the said conveyance of the said Guadalupe Bent to the said Maxwell, were and are, and each of them always was, and now is, wholly void as against Complainants.

The Complainants charge that the before described tract of land contains two million acres, and abounds in valuable mines of gold and silver, and valuable deposits of coal and other minerals and metals; that said grant contains a large extent of well-watered, irrigable lands, suitable for cultivation; also extensive forests of pine and other timber trees; and all the residue of the said lands is valuable for grazing; that the interest of Complainants at the time of the entry of said decree of September, 1866, of the said District Court, was reasonably worth the sum of \$100,000 and more, and has been ever since appreciating in value; that the same in fact extends beyond the Northern border of the Territory of New Mexico, two hundred thousand acres, or thereabouts, of valuable land being within the limits of the State of Colorado, all of which was known to said Maxwell at the time of procuring said conveyance, but was unknown to the said Guadalupe Bent.

They charge that their father Alfred Bent left a considerable estate in houses and lands, other than said grant, and in moneys and personal property, and the said Guadalupe Bent, Complainants' mother out of said estate, was then and always afterward well able to support and educate Complainants, and at no time was there any necessity for the sale of Complainants interest in said lands.

They charge that these facts were concealed from the District Court, at the time of the entry of the decree of September, 1866.

They charge that the decree of September, 1866, directing the conveyance and vacating and setting aside the former decree

is erroneous, in that it appears by the record that the District Court entered the decree upon the consent merely of parties, without setting forth who assumed to represent Complainants, or consent thereto in Complainants' behalf.

And in this—that although Complainants were infants of tender years, the decree was made by the District Court by consent of parties merely, without any reference to the master, or the examination of witnesses or judicial inquiry as to whether in fact such agreement as therein recited had been made, or whether the decree was or would be beneficial to Complainants, or whether any necessity existed for the sale or disposition of Complainants interest.

And in this—that it appears by the record that the District Court directed the said Guadalupe Bent should convey Complainants interest in said lands for a fixed sum, and to a certain person.

And in this—that the decree directed the conveyance to Maxwell by a day certain, and did not fix or limit any day for the payment by said Maxwell of the purchase price.

And in this—by said decree the District Court assumed to, and did assume to dispose and convert into money the freehold estate in lands of Complainants, then being infants of tender years, without any reason, cause, or necessity for such disposition or any disposition whatsoever thereof, and without any direction or security for the investment or preservation of such money.

And the execution of said decree has never been carried out, that no such conveyance as in the decree is directed has ever been made, nor has the money ever been paid.

That the Maxwell Land Grant & Railway Co., and Maxwell about the year 1870, exhibited in the District Court for the County of Colfax, in the Territory of New Mexico, a bill of Complaint against Guadalupe Thompson as administratrix of Alfred Bent, deceased, and Complainants, and setting forth among other things the two decrees above mentioned and praying that the trust in the first named decree established and declared, might be terminated and extinguished; that same was answered by Defendants by George W. Boyles, their guardian *ad litem*; testimony was taken, and a decree entered in said District Court, whereby it was adjudged that The Maxwell Land Grant & Railway Co. held said land free from any claim or interest of any of Defendants including these Complainants; that upon an appeal of all the Defendants to the Supreme Court of the Territory, the decree was affirmed, and upon an appeal from that Court to the Supreme Court of the United States, that decree was reversed, and said cause was remanded into the said Supreme Court of the Territory, and thence into the District Court of the said County of Colfax, and in said last Court The Maxwell Land Grant & Railway Co. has amended its bill in divers particulars, but sets

up nevertheless the decree of September, 1866, of the District Court of the County of Taos, and relies thereon.

They further charge that by reason of the decree of September, 1866, they have been unable to carry out the decree of June 3rd, 1865.

They further charge that said Maxwell has conveyed away certain parts or portions of said grant, that certain mines have been opened, certain portions of said land cultivated and great profits have accrued by reason of same.

To the end that the decree of June, 1865, establishing the rights of Complainants' ancestor, and directing partition thereof may stand and be enforced, and that it may be ascertained what lands have been conveyed away by Maxwell, and that the decree of September, 1866, be reversed annulled and from hence forth be held for naught, and that the pretended deed of conveyance of Complainants interest be declared null and void, and delivered up to be cancelled, and that an account be taken of the net gains and profits received by the said Maxwell Land Grant & Railway Co., and that one-twelfth part of said gains be decreed to be paid to Complainants, and for such other equitable relief as they may be entitled to, Complainants bring their bill.

A demurrer to the bill was sustained and the bill was dismissed, and upon an appeal to the Supreme Court of the Territory, the order of the District Court was reversed (3 New Mexico Reports, p. 158), and the case went back to that Court where issue was joined and trial had; upon that trial, Complainants' bill was dismissed, and upon appeal the Supreme Court of the Territory affirmed (p. 44, Record) the District Court, and the Complainants have appealed from the decree of the Supreme Territorial Court to this.

SPECIFICATION OF ERRORS.

On pages 89 and 90 of the Record of No. 388, will be found the following assignment of errors, upon which we shall rely upon the hearing for a reversal. The assignment of errors in Case No. 387 is virtually the same as in Case No. 388, and as we have before said the decision of No. 387 must depend upon the decision in No. 388, the assignment of errors in No. 387 is not here set out.

First.—The decree of the Supreme Court of the Territory of New Mexico, affirms the decree theretofore given in the District Court in and for the County of Colfax, in said Territory, whereas, in the decree of the said District Court, manifest error intervened to the prejudice of the said Appellants, and decree ought to have been given in the Supreme Court of the Territory of New

Mexico, reversing and annulling the decree so given in the District Court.

Second.—Also in this, to-wit: That the facts found and declared by the Supreme Court of the Territory of New Mexico are not sufficient to sustain the decree given in the District Court of the County of Colfax aforesaid, nor the decree of affirmation thereof given in the Supreme Court of the Territory of New Mexico, but on the contrary thereof upon the facts found by the said Supreme Court of the Territory of New Mexico, the decree given in the District Court of the said County of Colfax ought to have been reversed, annulled and in all things held for naught.

Third.—Also in this, to-wit: That in and by the said record and proceedings, it doth appear that by a certain final decree made and given in the District Court in and for the County of Taos, in the Territory of New Mexico, on the 3rd day of June 1865, Alfred Bent, ancestor of the now Plaintiffs and Appellants, was vested with one undivided twelfth part and share in the premises named in the bill of Complaint of Plaintiffs in the District Court of the said County of Colfax, and the decree afterwards at the September Term, 1866, given in the said District Court in and for the County of Taos, assuming to vacate, annul and set aside the final decree given on the 3rd day of June, 1865, was and is erroneous and void as against Appellants, and decree ought to have been given in the District Court in and for the said County of Colfax, according to the prayer of the Complaint of these Plaintiffs in the said District Court; whereas, in and by the judgment and opinion of the said Supreme Court the final decree of June 3rd, 1865, so given in the District Court of the said County of Taos, was declared to be interlocutory and further in and by the judgment, decree and opinion of the Supreme Court of the Territory of New Mexico, it is declared that the said decree entered at the September Term, 1866, of the said District Court in and for the County of Taos, assuming to vacate, annul and set aside the said former decree of the District Court upon the consent merely of the parties, not showing or setting forth who assumed to the said Court to represent or consent for the now Plaintiffs and Appellants in that behalf, and no evidence being heard touching the matter, was and is nevertheless effectual to vacate, annul and set aside such former decree in favor of Plaintiffs' ancestor, the said Alfred Bent.

Fourth.—It appears by the record and proceedings of the said Supreme Court that by a certain former decree and opinion rendered and given in this same suit, in the said Supreme Court of the Territory of New Mexico, it was found, adjudged, decreed and declared that by a decree given in the District Court in and for the said County of Taos, on the 3d day of June, 1865, as set forth in the Bill of Complaint of these Plaintiffs herein, there was vested in Alfred Bent, ancestor of these Plaintiffs, a

legal estate in the undivided one-twelfth part of the lands in the said Bill of Complaint mentioned, and that the decree given in the District Court in and for the said County of Taos, at the September Term, 1866, thereof, assuming and pretending to vacate and set aside such former decree in the District Court, was wholly erroneous and void; nevertheless the said Supreme Court of the Territory of New Mexico, by the decree and opinion rendered and given herein, at the July term thereof last past, doth in effect find, declare and adjudge, that the decree so given in the District Court in and for the said County of Taos, at the September term, 1866, was effectual to vacate, annul and set aside such prior decree of the said District Court.

BRIEF OF ARGUMENT.

The decree of June, 1865, was final.

Forgay vs. Conrad, 6 Howard, p. 201.

Whiting vs. The Bank, 13 Peters, p. 11.

Thompson vs. Dean, 7 Wallace, p. 342.

Ray vs. Law, 3 Cranch, 179.

Michaud vs. Girod, 4 Howard, 505.

Winthrop Iron Co. vs. Meeker, 109 U. S., p. 180.

Craighead & Wilson, 18 Howard, p. 201.

Perkins vs. Fourniquet, 6 Howard, p. 206.

The Bank of Lewisburg vs. Sheffey, 104 U. S., p. 445.

The Keystone Manganese and Iron Co. vs. Martin, 132 U. S., p. 91.

McGourkey vs. The Toledo & Ohio Central R'y Co., 146 U. S., p. 533.

The will of Alfred Bent, vested in Guadalupe Bent, a trust estate for life, charged with the maintenance of the three children.

Henderson vs. Haines, 2 Met. (Ky.), p. 342.

The decree of September, 1866 was not binding on Appellants.

1. Because the District Court had no power to appoint a guardian *ad litem* to convey away by deed the interest of minors, and the guardian *ad litem* had no power to convey same.—Bacon's Abridgement, Vol. 4, p. 546. Bouvier's Law Dictionary.

2. The settlement effected by those *sui juris* was unauthorized so far as the infants were concerned, and the guardian *ad litem* could not so bind them.—Taylor vs. Franklin Savings Bank, 50 Fed. Reporter, p 289.
3. The agreement or arrangement made by the guardian *ad litem*, in the case at bar was not such as a guardian *ad litem* was authorized to make.—Kingsbury vs. Buckner, 134 U. S., p. 134.
4. The interests of the minors in the case at bar were not of such character that the Chancellor had the power to allow them to be bargained away.—Cochran vs. Van Sorley, 20 Wendall, p. 376.
5. Even if the infants' interests were of such nature that the Chancellor might with legal discretion have allowed them to be sold for a money consideration, the decree herein must be reversed, for the decree of sale of the infants' interests was brought about by an unauthorized agreement, and as to the entering of which the District Court exercised no legal discretion whatever. There was nothing in the pleadings looking to a sale of the estate of the infants, and a decree directing its sale was grossly erroneous, if not wholly unauthorized. The decree of September, 1866, was so manifestly without the exercise of a legal judicial discretion such as would have protected the interests of the minors and obtained a fair and full price for the estate sold by exposing it to public vendue rather than, as seems to have been the case, to allow the greed of an unconscionable litigant who had controverted the title of the minors throughout the entire pendency of the suit, to prevail by the indulgence of the Court, and the unjust sacrifice of the estate of those who were incapable of protecting themselves, that it ought to be reversed.

ARGUMENT.

From an investigation of many authorities upon the question of the finality of decrees, it appears that what does or does not constitute a final decree depends in great measure upon the peculiar circumstances of each particular case, rather than upon any specific rule, and this being true the purpose of the action filed by the Bent heirs on September 12, 1859, and the effect of the decree of June, 1865, therein rendered must be examined.

From an examination of the bill (p. 46 of the Record), and

the amended bill (p. 49 of the Record), it will be seen that the principal point in the cause was the establishment of the Bent's claim to a portion of the land granted to Beaubien and Miranda, and while a partition is asked for, that must follow of course, if it be decided that Complainants were entitled to any part of the land. It was the establishment of their title primarily which was sought, and incidental to that was the partition.

The decree (p. 58 Record) established the Complainant's claim, and confirmed to them and their heirs and assigns forever one undivided fourth part of the land.

This is, beyond question, final as to the claim of Complainant to a part of the land.

There are three cases cited by the Supreme Court of the Territory of New Mexico in its opinion (p. 81 Record) to which we especially desire to draw the Court's attention, and in comparing these cases we would respectfully submit that the Territorial Court was in error as to the deductions drawn.

The first is the case of Forgay vs. Conrad, 6 Howard, page 201. The object of the bill in this case was to set aside sundry deeds made for lands and slaves, and for an account of the rents and profits of the property so conveyed; and also for an account of sundry sums of money which Complainant alleged had been received by one or more of the Defendants.

The case was proceeded in until it came on for hearing, when the Court passed a decree declaring sundry deeds therein mentioned to be fraudulent and void, and directing the lands and slaves therein mentioned to be delivered to the Complainant. * * * The decree then provides that the Complainant may have execution, and directs the Master to take an account of the profits of the lands and slaves ordered to be delivered up, and also an account of the money and notes received by one of the Defendants in fraud of the creditors, and concludes in these words: "And so much of the said bill as contains or relates to matters hereby referred to the Master for a report is retained for further decree in the premises. * * *"

This was held to be a final decree as to the matters therein adjudged.

The second case referred to is that of Craighead vs. Wilson, 18 Howard, p. 201, wherein "The Complainants filed their bill in the Circuit Court, claiming as heirs a part of the property of Joseph and Lavinia Erwin, deceased. * * * His property, real and personal, was much embarrassed; the persons claiming an interest in the succession were numerous; and from the loose manner in which the property was managed by the testator in his lifetime, and by those who succeeded him, great difficulty was found in the distribution of the estate. * * * The Circuit Court, having ascertained the heirship of the Complainants and their relative rights in the succession, referred the matter to a

“ special Master, to take an account of the succession of the said Joseph Erwin, Sr., Joseph Erwin, Jr., and Lavinia Erwin, in so far as it may be necessary to state the accounts between the Plaintiffs and the heirs at law, defendants in this suit, to ascertain the property in kind that remains in possession and control of either of the defendants except Adams and Whiteall as aforesaid, what has been sold, and the prices of the same, and the profits thereof, and he will report all the encumbrances that have been discharged by either of the Defendants on the same, and make to them all just allowances for payments and permanent and useful improvements and just expenses, and to ascertain what may be due to the Plaintiffs from either Defendant, and the said Master may make a special report of any matters that may be requisite to a full adjustment of the questions in the cause.”

This was held not to be a final decree, the Court saying in this connection: “To authorize an appeal the decree must be final in all matters within the pleadings, so that an affirmance of the decree will end the suit.”

The third case is that of Perkins vs. Fourniquet, 6 Howard, p. 206. The Court says: “Harriet J. Fourniquet and Mary T. Ewing are two of seven heirs and representatives of Mary Perkins, who was the wife of the Appellant, and who died about twenty years before the filing of this bill; that the appellees named were the children of a former marriage, and with their respective husbands filed the bill now before us against the Appellant, charging that during the marriage of the appellant with their mother there existed a community of acquests and gains in certain property, and praying that the Appellant might be compelled to account and pay over the amount due them as heirs of their mother. The Appellant denied in his answer that any community existed, and the case was proceeded in to hearing when the Circuit Court passed a decree declaring that the community did exist and that the Appellants, as heirs of their deceased mother, had a right to recover two-sevenths of all their mother’s rights of community which accrued during her marriage with Appellant; and also two-thirds of one-seventh as representatives of so much of the interest of a deceased brother, and referred the matter to a Master in Chancery to take and report an account of the acquests and gains; and prescribing fully and with proper precision the principles and manner in which the lands acquired were to be divided and the accounts taken, and the decree concludes by reserving all other matters in controversy between the parties until the coming in of the Master’s report.” This was held to be not a final decree.

In both the last cases cited above, to-wit: Craighead vs. Wilson and Perkins vs. Fourniquet, the very subject of the controversy consists of complicated and unascertained accounts, and it is

absolutely essential to ascertain the true status of the parties before there can be a decree adjudging their rights, and in the case of *Forgay vs. Conrad* the principal subject of controversy was the setting aside of the alleged fraudulent deeds, and the accounting must follow, of course, if the deeds were found to be fraudulent, and yet the Supreme Court of the Territory of New Mexico followed *Craighead vs. Wilson* and *Perkins vs. Fourniquet* rather than *Forgay vs. Conrad* in deciding the case at bar when, as we contend, the very object and purpose of this case was to establish Complainant's title, and if established the decree for partition followed, of course, and absolutely every direction necessary for the partition was specifically given to the Commissioners in the decree named.

Mr. Justice Collier, of the Supreme Court of the Territory of New Mexico, in delivering the opinion of the case at bar, also cites a rule laid down in *Craighead vs. Wilson*, as follows: "To authorize an appeal a decree must be final in all matters within the pleadings, so that an affirmation of the decree will end the suit," and says (p. 82, Record), "Tested by the rule stated in *Craighead vs. Wilson* it would seem that this decree [the decree of June 3, 1865] was not final so as to be appealable, because the pleadings certainly embraced two matters, one the establishing of the interest claimed, and the other the partition sought by the bill." In view of the language used by Mr. C. J. Taney in the case of *Forgay vs. Conrad*, it cannot be said that the rule laid down in *Craighead vs. Wilson* is the strict, universal and unalterable rule. Mr. C. J. Taney says in *Forgay vs. Conrad*: "The question upon the motion to dismiss is whether this is a final decree within the meaning of the acts of Congress. Undoubtedly it is not final within the strict technical sense of that term. But this Court has not heretofore understood the words 'final decree' in this strict and technical sense, but has given to them a more liberal and, as we think, a more reasonable construction and one more consonant to the intention of the legislature." Applying the principles of the case *supra* to the one at bar, our contention must prevail when it is observed that there are *two* matters embraced in the pleadings in the case of *Forgay vs. Conrad* just as certainly as there are in the case at bar, and even applying the strict rule of *Craighead vs. Wilson*, which the Territorial Court announces that it follows in deciding the case at bar, it seems to us that even that rule may be cited as sustaining our contention, for everything contained within the pleadings is decided in the decree of June 3rd, 1865, not only the right of the Complainants to a part of the land, and that there should be a partition, but also specific directions are given as to how that partition should be made.

Forgay vs. Conrad supra has been referred to more than any other case upon the question of finality of decrees, and the doc-

trine therein contained has been cited with approval on many occasions. It has been expressly reaffirmed in the case of *Thompson vs. Dean*, 7 Wallace, p. 342, and *Winthrop Iron Co. vs. Meeker*, 109 U. S., p. 180. The Court in the case of *Thompson vs. Dean* says: "In this case the decree directs the performance of a specific act and requires that it be done forthwith. The effect of the act when done is to invest the transferees with all the rights of ownership. It changes the property in the stock as absolutely and completely as could be done by execution in the decree for sale. It looks to no modification or change of the decree * * * So far as the Court below was concerned the decree in the case determined the principal matter in controversy between the parties, and since the decree could not be changed except through a new and distinct proceeding it determined that matter finally * * * The reasoning in the case just cited [*Forgay vs. Conrad*] vindicates the rule as a sound construction of the acts of Congress relating to appeals, and is sustained by the authority of several decisions.

Ray vs. Law, 3 Cranch, 179.

Whiting vs. the Bank, 13 Peters, 11.

Michaud vs. Girod, 4 Howard, 505.

In the case of the *Winthrop Iron Co. vs. Meeker*, 109 U. S., p. 180, the Court says: "In our opinion the decree as entered is a final decree * * * The whole purpose of the suit has been accomplished. The lease made under the authority of the meeting of October, 1881, has been cancelled and the management of the affairs of the company has been taken from the management of the Board of Directors. The accounting ordered is only in aid of the execution of the decree, * * *" and following this the Court cites *Forgay vs. Conrad* and the rule therein contained in support of its holding in the case under consideration.

In the case of *Whiting vs. the Bank*, 13 Peters, p. 11, the Court holds that a decree of foreclosure and sale is a final decree, and that the proceedings thereunder to wit: the sale and completion of the same was but a mode of executing the original decree like "the award of an execution at law."

In the Case of the *Bank of Lewisburg vs. Sheffield*, 140 U. S., p. 445, the question was as to which of two deeds was valid, the Court saying: "The controversy raised by the pleadings and to be determined by the Court, was whether the property passed under the deed to Plaintiff, or under that to Matthews, and whether the Bank was entitled to priority. * * * On behalf of the Bank it was claimed that the trust deed to the Plaintiffs was void on its face, and that by the terms of that deed, if valid, the debt of the Bank was preferred. By the amended and supplemental answer which it sought to file, the Bank raised the question that Glendy, not having the legal title when he executed the deed to the Plaintiffs, and by his prior

"deed to the Bank divested himself of his equitable title, the
 "Plaintiffs did not as Glendy's grantees under a conveyance
 "without any warranty whatever occupy the position of bona fide
 "purchasers, nor were they protected by the Recording Statutes
 "of the State. * * * So that all these matters were neces-
 "sarily passed upon by the Court, and the decree in terms declared
 "that the facts stated in the amended and supplemental answer
 "did not change the rights of the parties in the cause, made the
 "injunction perpetual, and directed the fund to be brought into
 "Court for distribution in accordance with the provisions of the
 "deed of Robert J. Glendy to Hugh W. Shelley and James Bum-
 "gardner, Jr., bearing date the 20th day of November, 1876.
 "This finally determined the entire matter litigated between the
 "parties, and nothing remained but to carry the decree into
 "execution."

In the Case of the Keystone Manganese & Iron Company vs.
 Matt. Marten, 132 U. S., p. 91, and also in the Case of McGourkey
 vs. The Toledo & Ohio Central R'y Co., 146 U. S., p. 523, the
 leading cases upon the finality of decrees are cited and classified,
 and inasmuch as we have been unable to find a case exactly parallel
 with the one at bar, we have cited the above cases as containing
 the general principles which we think applicable to the subject
 discussed.

If it becomes necessary to have a construction of the will of
 Alfred Bent, our contention is that by the terms of that will,
 Guadalupe Bent held the estate devised in trust jointly for the
 maintenance of herself and the children of the testator named,
 which trust necessarily terminates with her life, and the fee passes
 by the terms of the will to the children and heirs as aforesaid as
 stated in the conclusion of the will.

Henderson vs. Haines, 2 Met, (Ky.), p. 342.

We now come to the question as to the validity of the decree
 of September, 1866, so far as it effects the rights of Appellants.

On the 9th day of April, 1866, the following order, (p. 69 of
 the Record), was entered: "By agreement of the parties the
 "continuance of this cause, made herein on a former day of this
 "term of this Court, is set aside, and on motion of solicitors for
 "Complainants, Guadalupe Bent is hereby appointed guardian
 "ad litem, and Commissioner in Chancery for the minor heirs of
 "Alfred Bent in this cause, with full power to execute deeds, or
 "to carry into execution all sales or transfers made of their in-
 "terest, in and to the real estate therein described to Lucien B.
 "Maxwell, one of the Defendants in said cause, and this cause
 "stands continued until the next term of this Court."

The District Court had no power to appoint a guardian *ad litem*
 for the purpose set out in the above order.

"A guardian *ad litem* is one appointed for the infant to defend
 "him in an action brought against him. * * *

"The powers and duties of a guardian *ad litem* are confined
"to the defense of suits."—Bacon's Abridgement, vol. 4, p. 546.

"A guardian *ad litem* is one appointed to represent the ward in
"legal proceedings to which he is a party Defendant."—Bouvier's
Law Dictionary, vol. 1.

With all possible respect for the Supreme Court of the
Territory of New Mexico, we are constrained to say that we are
altogether unable to understand upon what theory it arrives at the
conclusion shown in the following language, (p. 84, Record), of
Mr. Justice Collier, in delivering the opinion of the Court :

"In Taylor vs. Franklin Savings Bank (50 Federal Reporter,
"p. 289), it is stated to be well settled that infants can by an
"original bill in the nature of a bill for review attack any decree
"against them during their infancy, and have it set aside for fraud
"or error in fact."

"This Case is essentially like the Case at bar in one respect,
"viz : The decree was upon a settlement and compromise made
"between a foreclosing bank and the *guardian ad litem* of infant
"Defendants, and the Court say : 'It may be and probably is true
"that so long as this decree is allowed to stand, it is binding by
"its terms on the infant Defendants;' and then after announcing
"as above the rights of attack by them for fraud or error of fact,
"the decree was held to be successfully impeached for fraud and
"was set aside. There was no pretense in that case that the
"settlement and compromise by the *guardian ad litem* vitiated of
"itself the decree, but it must have been taken by the Court as
"advisory, and was held unauthorized and inequitable because of
"the suppression of facts known to the Plaintiff.'" We have
quoted *supra* from Mr. Justice Collier, in delivering the opinion
of the Supreme Court of New Mexico, and we now quote from the
case referred to by him. "Assuming as I do the right of these
"minors to attack this bill of foreclosure by their bill, I think the
"Court must now assume that had all the facts touching the
"validity of the securities involved in that suit been presented to
"the Court, the Court must have held that the securities sought
"to be foreclosed and enforced in that proceeding were invalid
"and have dismissed that suit for want of equity as against the
"infant Defendants; and as the Court was prevented from doing
"so, and was led into making an *inequitable decree by the un-*
"authorized agreement of the *guardian ad litem*, it will in this
"suit now brought by the minors themselves enter such decree as
"should have been entered in the original foreclosure case."

This language in our opinion is certainly unequivocal upon the
subject of the right of the *guardian ad litem* to bind the infants
by an unauthorized agreement.

In the same case, p. 291, the Court says : "After the origi-
"nal trust deed was found, the bank filed a supplemental bill in
"the foreclosure case, which was answered. Before a report was

“made by the master, terms of settlement or compromise were
 “made between the bank and the guardian *ad litem* of the infant
 “defendants then in court.”

This trust deed referred to was the paper which would have supplied all the necessary facts, and by its loss this complication arose, so that after it was found, and set up by the Bank's supplemental bill, it certainly must be assumed that it was the guardian *ad litem*'s so-called compromise, and not a suppression of the facts which led to the decree complained of.

Mr. Justice Collier delivering the opinion of the Supreme Court of New Mexico also cites (p. 84 Record) Kingsbury vs. Buckner, 34 U. S., p. 650, in support, we infer, of his opinion that a guardian *ad litem* may make a compromise of the infants' rights. He says: “A guardian *ad litem* can not bargain
 “away the rights of the infant he represents, but he can assent
 “to such arrangements as will facilitate the determination of a
 “suit.”

We take the liberty of using the whole of the quotation, and also that which follows, to show the connection in which the quotation *supra* was used.

“The Court whose duty it is to protect the interests of the
 “infant should see to it that they are not bargained away by those
 “assuming or appointed to represent him, but this rule does not
 “prevent a guardian *ad litem* or a *prochein amy* from assenting to
 “such arrangement as will facilitate the determination of the
 “case in which the rights of the infant are involved. There is
 “but one Supreme Court of Illinois, although for the convenience
 “of litigants it sits in different places in that State, and unless
 “the consent of parties is given can take cognizance when hold-
 “ing its session in a particular grand division only of cases aris-
 “ing in such division.

“But it is the same Court which sits in the respective divi-
 “sions, and a consent by the next friend or guardian *ad litem*
 “that a case be heard in a particular division could not possibly
 “prejudice the substantial rights of the infant. It is true that
 “the consent of the plaintiff's next friend and guardian *ad litem*,
 “that the case should go to the Central Grand Division brought it
 “to a more speedy hearing than it otherwise would have had if
 “such consent had not been given. But certainly it was not to
 “the interest of the Plaintiff that the final determination of the
 “case should be delayed.” *Court*

So that, when the Supreme says the “guardian *ad litem* may
 “assent to such arrangements as will facilitate the determination
 “of a suit,” it does not mean that the guardian *ad litem* shall
 throw away the infants' rights in order to stop the litigation.

Even if it be true that the “Chancellor may order such a
 “disposition of the infants' property when the legal title to same
 “is in trustees, as he in the exercise of a sound legal discretion

“ may deem most beneficial for the infants,” and we do not question this doctrine when properly applied, yet we insist that this is no such case as *Cochran vs. Van Sorley*, 20 Wendall, p. 376, which Mr. Justice Collier cites as authority for affirming the District Court in its finding that the alleged sale of the Bent’s property to Maxwell by the guardian *ad litem* was proper. In *Cochran vs. Van Sorley* the Court says: “ It is a settled principle that “ whenever the property of infants consists of real or personal “ estate, the legal title to which is in trustees, the Chancellor, as “ the general guardian and protector of the rights of all infants, “ may authorize such a disposition thereof as he, in the exercise “ of a sound legal discretion, may deem most beneficial to such infants.” This much Mr. Justice Collier quotes, but to continue the language of the New York Court, and adding to the quotation *supra* the opinion reads: “ The only restrictions upon that power “ are those which the Court has from time to time imposed upon “ itself in the nature of general rules to regulate the exercise of “ such discretion, and those imposed by certain provisions of the “ Revised Statutes rendering Trustees incapable of transferring “ the title to trust estates in contravention of the trust expressed “ creating such estates.”

“ The same power is given to the Chancellor over the legal “ estate of infants by the several Acts in relation to the sale of “ infants’ estates, subject, however, to the limitation imposed by “ the legislature that such estates shall not be sold or disposed of “ contrary to the provisions of the will or conveyance by which “ the estate was devised or granted to the infant.”

So that it is clear the case at bar is not such a trust estate as that in *Cochran vs. Van Sorley*, for in that case the trust estate was one made so by a will; in this, one in which the persons holding the legal title were so holding it *ex malificio*, as it were. In that case the Court had under consideration the validity of sales made for the infants’ maintenance—in this, it is an effort to establish the infant’s title, and no sale was contemplated for any purpose, nor asked to be decreed by the Court.

We think the Court will hold that such an agreement as seems to have been entered into in this cause by those *sui juris* was altogether unauthorized and invalid to bind the infants, and the only question remaining is whether or not the conveyance of the property and the entering of the decree of September, 1866, are such errors as this Court will allow to stand as against those who were unable to protect themselves?

The decree of September, 1866 (p. 73 of the Record), of itself shows that it was entered for the purpose of carrying out the agreement which had been made.

There was absolutely nothing in the case which looked to a sale of the property, and although a sale was not contemplated by the pleadings, we would not have questioned the validity of the

so-called consent decree, made to carry out the compromise, had all the parties interested been competent to act, but it certainly will not be contended on the part of the appellees that a consent decree would have been proper had the infants acted in their own behalf, or had the guardian *ad litem* consented for them, how much less then can they contend that the decree is without error which does not show who consented for them, and when as a matter of fact there is absolutely no person having the power to consent?

We further insist that the District Court acted with no legal judicial discretion in permitting the decree of September, 1866, to be entered, but was actuated solely by the alleged consent and agreement of the parties.

That the Bents were entitled to the legal estate as adjudged to them by the decree of June 3rd, 1865, cannot be questioned, and while the Court, it is claimed, had the right to set aside that order at any time while the suit was pending, we claim that it could be done, not capriciously, but only if the Court discovered itself to have been in error; if the Bents were entitled to a legal estate in June, 1865, nothing had appeared in the record to show that they were not so entitled in May, 1866, nor in September, 1866. Will it be contended that the discretion of the Court was exercised in converting a legal title into an equitable claim in order that a compromise might be carried out, and especially so when the decree establishing the legal title followed the purpose of the action and the decree carrying out the compromise and vitally affecting the interests of the infants, was in no wise contemplated by the pleadings? We think the language used by the Court in the case of Taylor vs. The Franklin Savings Bank *supra* is applicable here. "The Court was led into making an inequitable decree by the unauthorized agreement of the guardian *ad litem*," excepting the fact that it cannot even be claimed that the guardian *ad litem* in case at bar consented to the decree. There is absolutely nothing in the record to show that the Court had any concern for the interests of the infants, but on the contrary there is an utter disregard of them. There was no provision for the protection of the infants by having the money paid for their interest,—there was no provision for their protection in securing the money for their benefit after it was paid. If the money was to be paid to Guadalupe Bent as guardian *ad litem* there was no bond required of her, none had been provided by her, and as a matter of fact neither the guardian *ad litem* nor any other person was authorized to accept the money if it should be tendered. There was no investigation by the Court of the value of the infants' interests, no exposure of same to public vendue whereby the best price could have been obtained, but the decree is for the sale of the interest to a litigant who had been resisting the claim of the Complainants from the inception of the cause, and whose whole

interest and purpose was directed toward acquiring that interest.

A reversal of the cause is respectfully asked, and if same should be granted, the other cause, Guadalupe Thompson, administratrix re. vs. The Maxwell Land Grant and Railway Co. &c., No. 387 must follow as a matter of course.

S. D. ROUSE,
For Appellants.

JOHN G. CARLISLE,
JAMES O'HARA,
CALDWELL YEAMAN,
E. T. WELLS,
R. T. MCNEAL,
JOHN G. TAYLOR,
Of Counsel.

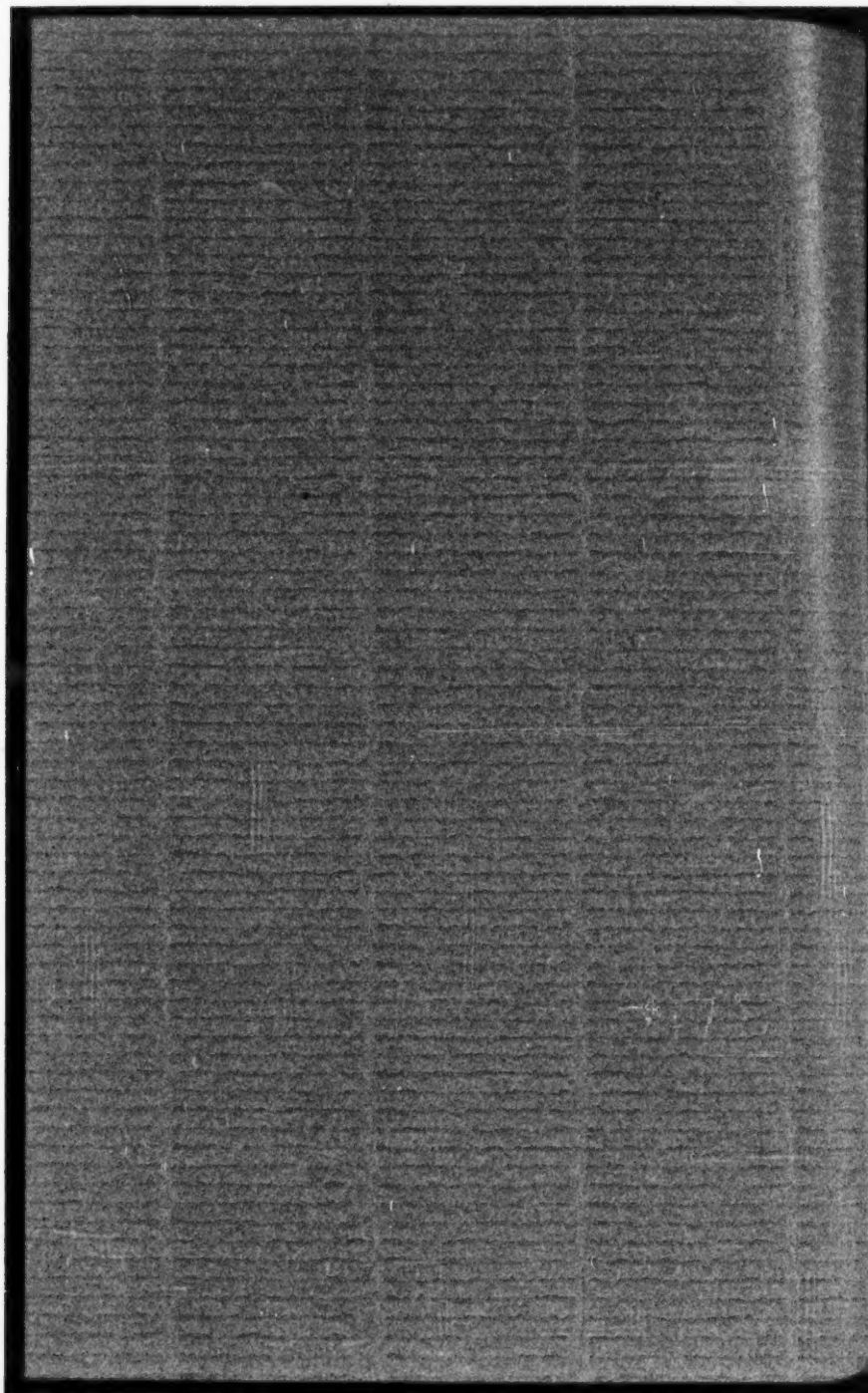
7
8

SALE OF THE ESTATE
OF
J. I. WILSON,
DECEASED.

J. H. CARLSON,

of Counsel.

Attorneys at Law.



—IN THE—

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

GENERAL NO. 16109: TERM NO. 90.

GUADALUPE THOMPSON,

Administratrix of the ESTATE
OF ALFRED BENT, Deceased,
GEORGE THOMPSON, her
Husband, CHARLES BENT,
JULIAN BENT, and ALBER-
TO SILAS BENT,

Defendants and Appellants,

vs.

The MAXWELL LAND GRANT
AND RAILWAY COMPANY,
and L. B. MAXWELL,

Complainants and Appellees.

*Appeal from the Su-
preme Court of the
Territory of New
Mexico.*

BRIEF AND ARGUMENT OF APPELLANTS

Statement of the Case and History of the Litigation.

While the subject of this controversy is a Mexican land grant, neither the validity of the

grant, the correctness of its survey, nor the regularity or effect of the confirmation by congress is made a question. Complainants and appellees claim title to the entire grant by purchase, and defendants and appellants, Charles, Julian, and Alberto Silas Bent, to an undivided one-twelfth part of it by inheritance from their father Alfred Bent.

The controversy, in one phase or another, is of long standing, and has an interesting history. Under its policy of making grants of large bodies of land to private persons as a means of inviting settlers and encouraging the development of the country, the republic of Mexico, in 1841, made a grant to Charles Beaubien and Guadalupe Miranda, of the lands in controversy, for many years known as the Beaubien and Miranda grant, but for the last quarter of a century as the Maxwell land grant. It includes nearly 2,000,000 acres of the most valuable lands in the territory of New Mexico.

In September, 1859, the heirs of Charles Bent, viz. Alfred Bent and his two sisters, Teresena Schenrick and Estefana Hicklin, to establish their claim, instituted suit in the District court for the county of Taos, against the said Beaubien and Miranda and Lucien B. Maxwell, the latter having in the meantime acquired an interest in the grant from the original grantees or their heirs. The bill alleged in substance that the father of complainants, at the time of his death, was equally interested with Beaubien and Miranda in the ownership of the

grant, and prayed that their interest be established and decreed to them, and that it be also set off to them by partition. The court afterwards, in June, 1865, upon the pleadings and proofs, decreed them an undivided one-fourth part of the grant, and appointed commissioners to make partition, giving specific directions for their guidance. In December following, and before the commissioners had acted, Alfred Bent, one of the complainants in that suit died, and at the following April term of the court appellants Charles, Julian and Alberto Silas, his infant children and heirs, were substituted as complainants in the suit instead of their father; and a few days later a further order was entered appointing their mother, Guadalupe Bent, guardian *ad litem* and commissioner for said minors, with power to execute deeds or carry into execution all sales or transfers of their interest to said Maxwell. A few weeks later, on May 3, 1866, Mrs. Bent, as such guardian *ad litem*, and reciting this order as her authority, undertook to convey to said Maxwell, for the consideration of \$6,000, the undivided one-twelfth of the said grant inherited by them from their father. At the next term of the court, about four months after the execution and delivery of this deed, and on September 10, 1866, a further order was entered in said cause, reciting the making of a "mutual agreement" between the parties "settling and determining all the equities" in the case, whereby it was "decreed by the mutual consent

and agreement" of the parties that the decree of June, 1865, establishing the interest of the complainants in the grant and directing that it be set off to them, "together with all orders made under and by virtue of the same, be set aside;" and by like recited consent it was further ordered that Lucien B. Maxwell pay to the complainants in the cause \$18,000, one-third each to Teresena Scheurick and Estefana Hicklin, "and to Charles Bent, Julian Bent and Alberto Silas Bent, the children and heirs of Alfred Bent" the other third, or \$6,000, and that said Scheurick and wife, Hicklin and wife and Guadalupe Bent, guardian *ad litem*, within ten days make conveyance of all their right, title and interest in the said grant to said Maxwell. Nothing was ever done under this last order, all the parties having executed and delivered deeds to Maxwell in the previous May.

Following these proceedings, and about April, 1870, L. B. Maxwell, having in the meantime acquired from Beaubien and Miranda, or their heirs, their remaining interest in the grant, undertook to sell and convey to the Maxwell Land Grant & Railway company, for the consideration of \$1,350,000, the entire grant, reserving the home ranch of about 1,000 acres containing the improvements, together with some mining claims, and also excepting from the conveyance a few thousand acres which he had before conveyed to other parties. An abstract of the pleadings will sufficiently disclose the

other facts necessary to a comprehension of the case.

The Maxwell Company's Original Bill in this Suit.

In August, 1870, L. B. Maxwell and the Maxwell company, recognizing the irregularities and insufficiency of the proceedings taken to acquire the title to that portion of the grant held by Alfred Bent at the time of his death, filed in the District court of Colfax county, in which at that time the greater part of the grant lay, their original bill against appellants, Guadalupe Thompson and her husband, (Mrs. Bent in the meantime intermarried with George W. Thompson), and Charles, Julian and Alberto Silas Bent. After setting out the making of the grant and its confirmation by act of congress, the conveyance of the greater part of it to the Maxwell company, the institution of the suit by the heirs of Charles Bent in 1859 and the loss of the pleadings, the bill alleges that on May 29, 1865 (June 3, in fact), a decree was entered in that suit decreeing to said heirs an undivided fourth part of the said grant and an order directing partition thereof. That after said decree, and before steps had been taken to make such partition, the complainants in that suit, in the lifetime of Alfred Bent, by way of a compromise of what was regarded as a doubtful and uncertain

claim, entered into an agreement with said Maxwell to convey their interest to him for \$18,000; that before this agreement could be executed said Alfred Bent died in December, 1865; that his death was suggested at the following April term of court and his infant children and heirs aforesaid were substituted as co-complainants, and their mother Guadalupe was appointed their guardian *ad litem* and commissioner to sell and convey their interests, etc.; that thereupon a decree was made upon consent of solicitors of the parties, setting aside the decree of June, 1865, and ordering conveyance to be made by said guardian *ad litem* to L. B. Maxwell; that said Guadalupe undertook by deed, dated May 3, 1866, to convey said interest, and that said Maxwell had paid the said consideration. It is then alleged that this last order or decree (which was in fact made September 10, 1866) setting aside the previous decree, was without jurisdiction, and that some of its directions as to the conveyance of the interests of the minor heirs of Alfred Bent and making payments therefor, were irregular; that instead of the agreement for the conveyance having been made by them as recited in said order, it was in fact made by their father in his lifetime; that instead of ordering the purchase money paid to the guardian *ad litem* of said minors, it should have been directed to be paid to the personal representatives of said Alfred, and that in fact payment had been made to said Guadalupe Bent as adminis-

tratrix; that the court had no jurisdiction to order a conveyance of the interest of said minors. It is then declared that by reason of the aforesaid irregularities and void decree, it is doubtful in law whether, as against the said minor children and heirs of said Alfred Bent, it sufficiently appears that they have no equitable or other interest in the said premises, and that such doubt creates a cloud upon the complainants' title, etc. A decree is therefore prayed that the trust in favor of said infants be extinguished, and that complainants be decreed to hold the premises free from claims by them, etc. To this bill are annexed copies of Maxwell's deed to the Maxwell company, the decree of June, 1865, orders of April and decree of September, 1866, and the deeds made by said Guadalupe and her husband's sisters, together with all the pleadings in the original suit by Charles Bent's heirs, all of which are prayed to be taken as part of the bill.

Answer of Defendants.

Guadalupe Thompson and her husband George W. Thompson answered denying that Alfred Bent at any time was a party to the alleged agreement to convey his interest in said grant to said Maxwell, and as to the proceedings in the District court at the April and September terms, 1866, without admitting their validity, they protest against the same as illegal, unjust and void as to the said

minor children of Alfred Bent, and deny that their title was, thereby divested; and aver that said Guadalupe was wholly ignorant of her duties as guardian *ad litem* of her minor children, and wholly ignorant of their rights in the premises; but as to whether the interest of said Alfred Bent and his minor heirs was terminated and extinguished being questions of law, they are not competent to answer, but are advised that the supposed deed of said Guadalupe was illegal and void as to said minors; deny that \$6,000 have passed to said Guadalupe from said Maxwell, but admits a portion may have so passed, but whether it passed to her as administratrix or guardian *ad litem* she is and was at the time wholly ignorant.

The answer of said minors Charles, Julian and Alberto Silas Bent, by George Boyles their guardian *ad litem*, avers that they are infants of the age of 11, 9 and 7 years respectively, and as such submit their interests to the protection of the court, praying strict proof of the allegations of complainants' bill.

Decrees Entered and Reversed under Original bill and Answers.

In September, 1873, on the pleadings and proofs, the said District court entered a decree in favor of complainants which set aside as erroneous the decree of September 10, 1866, assuming to vacate

the original decree of June, 1865, in favor of Charles Bent's heirs, and directing a conveyance of their interest in the grant to Maxwell. But notwithstanding the order directing such conveyance to be made was set aside as void, and the proof negatived the allegations of the bill that Alfred Bent in his lifetime made the alleged agreement of sale, the attempted conveyance was sustained as a transfer of the interest of said minors; and it was decreed that the premises were held by the Maxwell company discharged of all right, title or interest of the defendants. The territorial Supreme court at its January term, 1874, affirmed this judgment, but on appeal to this court at its October term, 1877, the judgment was reversed on the ground that complainants "failed to substantiate the main fact relied upon by them, viz. that the agreement for a compromise was concluded with Alfred Bent in his lifetime." It is further declared that the complainants' bill, being essentially a bill of review to set aside a consent decree, could not for that reason be maintained (95 U. S. 391).

**Complainants' Amended Bill after Reversal
of the Decree in their Favor.**

The cause having been remanded by this court to the territorial court, with directions that complainants be allowed to amend their complaint as they might be advised, with liberty to defendants

to answer new matter, etc. complainants in March, 1880, filed their amended bill wholly changing their position. The amendments were almost entirely by elimination, striking out the allegation that Alfred Bent in his lifetime made with Maxwell the alleged agreement to convey, together with all allegations, general or specific, as to the errors and irregularities of the decree of September 10, 1866; and upon such different and inconsistent state of facts the same relief is asked as in the original bill, viz. that they be decreed to hold the premises discharged from all right, title or claim by defendants.

Before the issues were fully made, the bill was further amended by the suggestion of the death of L. B. Maxwell, and the averment that before his death he had conveyed his remaining interest in the grant to the Maxwell company, whereby that company became sole complainant.

Amended Answer of Defendants to Complainants' Amended Bill.

To complainants transformed pleading defendants and appellants in March, 1880, filed their joint and several answer. In their answer to the original bill defendants denied that Beaubien and Miranda had maintained quiet and peaceable possession, and that Maxwell and his wife had become the sole owners. These and some other denials

and many admissions of facts, which do not affect the case, are repeated in this answer. Then follow other averments and denials which were considered by defendants as answers to the amended bill, which, except in its prayer, is essentially a new complaint and a new cause of action. This portion of the answer denies that Alfred Bent in his lifetime, or either of the defendants, had ever been a party to the alleged agreement for the sale of their interest, or that their rights after the decree of June, 1865, had been regarded as doubtful or uncertain; avers that the proceedings set forth and relied on in the complaint as divesting their title were illegal and void as to said infant defendants; denies that the alleged consent decree of September 10, 1866, was made at the request or with the consent of said infants, or any one authorized to act for them; avers that the interest sought to be acquired for \$6,000 was worth at the time \$100,000 or more, and that the alleged settlement was in no way advantageous to them or necessary to their maintenance; denies that the sum of \$6,000 had been paid to Guadalupe Thompson; admits that about \$1,000 had been paid, but denies that any part of it had been received by the infant defendants, and offering to refund it if it should appear on the hearing that any one with authority to act for them had received any part of said sum; and avers that the deed from Guadalupe had been procured by fraudulent representations upon the part

of Maxwell; avers that the decree of September 10, 1866, setting aside the decree establishing the rights of their father, was obtained by fraud and deceitful practices upon the part of Maxwell; denies that complainants are entitled to hold said grant discharged of any right or title of the said infant children of Alfred Bent.

To these portions of the answer complainants filed exceptions.

Separate Answer of Charles Bent.

Charles Bent having attained his majority, in March, 1882, filed his separate answer, in which he denies the exclusive quiet possession of the grant by complainants; or that by any means Maxwell had ever become the owner of the whole of said grant; or that the pleadings in the suit of Alfred Bent and others were lost or destroyed as alleged; avers that by the terms of the decree of 1865 an undivided one-fourth of said grant was confirmed to Alfred Bent and other heirs of Charles Bent, with right to possess and enjoy the same; that false representations were made to the sisters of said Alfred Bent and their husbands by Maxwell as to the extent and character of the grant, as a means of procuring the conveyance of their interests; admitting the making of the deed of May 3d, 1866, by Guadalupe Bent; avers she was a Mexican woman when appointed guardian *ad litem*, and at the time of making said

deed and the entry of the decree of September 10th, 1866, unable to speak, write or understand the English language, unfamiliar with business or proceedings of courts, and unacquainted with the rights of her children in the premises or her duties as guardian *ad litem*, as also with the bounds, character and value of said grant and of the decree establishing the rights of the said parties in said grant, or of the share or part claimed by her husband; that she was accustomed to consult and rely on said Scheurick, who professed friendship for herself and her children, and a desire to protect their interests, by reason whereof she reposed special trust in him; that she and said Scheurick had long known said Maxwell to be a man of great wealth and influence, and that he had knowledge of her ignorance, weakness and inexperience, and of her want of information as to the extent and value of the grant and of the decree establishing the rights of the said Alfred and his sisters; that said Maxwell caused and procured her appointment as guardian *ad litem*, and procured the pretended conveyance; that said Maxwell caused said Scheurick to believe, and represent to her, that said grant was of but little value except for grazing, and contained but little or no mineral; that it extended only to the New Mexico line, and that owning the greater part thereof said Maxwell would control the whole and exclude her children from all share in it; and said Maxwell also caused the said Scheurick to represent to her that she was author-

ized to sell and convey their interest, and unless she should accept the said \$6,000 therefor, neither she nor her children would ever realize anything therefrom; and, moved by these considerations, she made the pretended conveyance; that the contents of the deed were not made known to her; that it was made without advice of counsel; that the said Maxwell did not pay to her, or any other person for her, at the time nor since, the said \$6,000, or any sum of money whatsoever; that the grant contains about 2,000,000 acres, and abounds in valuable minerals, a large extent of well-watered, irrigable lands, and extensive forests of timber, the residue being very valuable for grazing; that about 200,000 acres of said grant in fact lay in Colorado; that the interest of said infants on May 3, 1866, was reasonably worth \$100,000 or more, and has since been appreciating in value. All of which on information, etc. was known to said Maxwell when he procured said pretended conveyance.

It is further averred, on information and belief, that said Alfred Bent left a considerable estate other than said grant, consisting of houses, lands, moneys and personal property, from which their mother then, and always afterward, was well able to maintain and educate her said children; that there was no necessity for the sale of their interest in said grant; denies on information, etc. that said Guadalupe Bent, or any solicitor representing her said infant children, ever requested or consented to the

setting aside of the decree establishing the right of said Alfred Bent and his sisters; that said decree of September, 1866, was procured in the absence of, and without notice to, said Guadalupe, and by false representations of said Maxwell or some other person; that the facts herein stated touching the ignorance and weakness of said Guadalupe, and the impositions practiced upon her, the extent and value of said grant and the estate left by said Alfred, and the sufficiency thereof to maintain and educate said children, were concealed from said court; that the said decree was obtained by false representations and concealment aforesaid; that there was no reference to a master or inquiry as to whether said decree would be beneficial to said infants; avers that by said decree (of June, 1865,) the said Alfred Bent became fully seized of and entitled to an undivided one-twelfth part of said grant, and his heirs are entitled now to have it set off to them; that by the amended bill it appears that plaintiffs have no title to the relief demanded, neither has the court jurisdiction to grant the relief, and defendant craves the same benefit of this defense as if he had demurred. To all of the foregoing portions of the separate answer of Charles Bent, complainants also filed exceptions.

Exception to Answers Sustained, and Appeal.

The court sustained all these exceptions, both to the joint and several answer of defendants and

to Charles Bent's separate answer; and having practically stricken out their defense, the District court entered judgment against them, from which an appeal was taken to the Supreme court of the territory, where the judgment was reversed and the portions of both answers stricken out by the lower court were ordered restored.

Thompson *et al* vs. M. L. G. & Ry. Co. 6
Pac. Rep. 193.

Final Hearing in District Court and Decree for Complainants.

Testimony was then taken under the issues thus formed, and the cause having been before submitted to the District court and taken under advisement, his Honor James A. O'Brien, presiding judge, in May, 1893, entered a decree for complainants, declaring that the premises were held by the Maxwell Land Grant & Railway company, free from any claim of defendants. An appeal was again taken by defendants to the Supreme court of the territory, where a judgment of affirmance was entered in July, 1895, from which this appeal is prosecuted.

Findings of Fact by Territorial Supreme Court.

The findings of fact made by the territorial Supreme court are set out at pages 103-33 of the printed record. They include a copy of the bill

filed by the heirs of Charles Bent in September, 1859, setting up the interest of their deceased father in the grant, their heirship, etc. and praying that their interest be established, and that it be set off to them by partition when established; the overruling of demurrers to the bill; also copies of the several answers made to the bill by defendants Beaubien, Miranda, Maxwell and Joseph Pley, a grantee of Maxwell of a small part of the property; a copy of the decree rendered June 3, 1865, the substantial parts of which have already been stated. It is found that the evidence upon which the decree was based does not appear in the record, but that the decree recites the cause was heard on the pleadings and testimony on file, the pleadings alone having been found since the institution of this suit by the Maxwell company in 1870; that the commissioners appointed by that decree never acted; that Maxwell declared he would appeal that cause and, if necessary, carry it to the Supreme Court of the United States; that afterwards the heirs of Charles Bent entered into negotiations for a compromise on the basis of Maxwell paying them a money consideration to relinquish their claim; that it was understood that either Alfred Bent or Scheurick or both should act as agents to sell Maxwell their interests in the grant for the best price they could get, but not less than \$21,000 or what Beaubien's heirs got; that in September or October, 1865, Alfred Bent, acting for

himself and his sisters, went to Maxwell's residence to try and make a sale of their interest; that Judge Houghton, one of the counsel whom Alfred Bent consulted, told him he had better settle than take the award of the commissioners; that Bent demanded \$21,000 and Maxwell offered \$18,000; that Bent returned to his home without having effected an agreement with Maxwell as to the price; that the Bents considered the sale as good as made, but Alfred Bent said they could get a few thousand dollars more by being quiet a few days; they were expecting to close the bargain in a few days deeds having already been written out by Schenrick, husband of Teresena Bent; that before anything was done Alfred Bent died in December, 1865, leaving a widow Guadalupe and three children, Charles, Julian and Alberto Silas, aged respectively 6, 4 and 1 year; that on April 12, 1866, Guadalupe was appointed administratrix of Alfred's estate and qualified; that a few hours before Alfred Bent was shot, on December 3, 1865, he directed one of the commissioners to proceed with the partition, saying he considered his and his sisters' interest worth \$150,000.

It is further found that Alfred Bent left a will which, with the record of probate, is set out in full in the findings, the devising words of which are "I give and bequeath unto my wife Guadalupe Long Bent, for the maintenance of her and my three children, Charles, Julian and Silas Bent, all of my real

and personal property, money, goods and effects." In this connection is also set out a copy of the inventory of Alfred Bent's estate, filed 6th day of March, 1867, showing an estate valued at about \$12,000, also proof of debts against said estate to the amount of about \$1,800. The court then finds this will and accompanying proceedings were not introduced in evidence till the close of the testimony by the Maxwell company in 1886, and after the decision of *Thompson vs. Maxwell*, 3 N. M. 269.

It is further found that Beaubien left six children and that Maxwell married one of them, and purchased the interest of the others in the grant for not over \$3,500 per share, between April, 1864, and January, 1870, all the said vendors or their husbands, as well as Alfred Bent and his sister's husbands, being farmers, merchants or stock raisers and intelligent men, Scheurick and Hicklin being considered men of wealth and influence; sets out a copy of the order of the District court, April 9, 1866, substituting for Alfred Bent his three minor children Charles, Julian and Alberto Silas, as co-complainants with the other heirs of Charles Bent in the suit, and a copy of the further order made two days later as to the appointment of Guadalupe Bent guardian *ad litem* and commissioner for said minor children to convey their interest in the grant, and continuing the cause to the next term. It is then found that both of these orders were made at the instance and in accordance with the wish

of Maxwell or his counsel as necessary to the validity of the conveyance; that the negotiations interrupted by the death of Alfred Bent had been resumed, the Bent heirs being represented by Aloys Scheurick; that a settlement was concluded which was satisfactory to the parties, and by which Maxwell was to pay \$18,000 for a conveyance of their interests, the same being advised by Merrill Ashurst, leading counsel for them, the ground of his advice not being stated; that Scheurick and the others did not consider their claim after the decree of 1865 as doubtful or uncertain, one of the reasons for the settlement being that the suit might drag on a long time, Maxwell having said to Scheurick that he had the means and would out-law them, putting it off from court to court, having also some time before told Scheurick he had paid his attorney \$1,000 to put the case off for six months. The findings include a copy of the deed dated May 3, 1866, by Guadalupe Bent as guardian *ad litem* of her children, for the conveyance of their undivided one-twelfth interest in the grant, and warranting their title thereto, for the consideration of \$6,000 cash in hand, reciting in *haec verba*, as her authority, the before-mentioned order of April, 1866, appointing her guardian *ad litem*, commissioner, etc. It is then found by the court that this deed was prepared by Maxwell's counsel, and that no other conveyance was made by Guadalupe Bent; that Alfred Bent's two sisters and their husbands executed to Maxwell similar convey-

ances about the same time, each for the consideration of \$6,000.

It is then found that afterwards and at the September term, 1866, of the District court a decree was entered in said cause, a copy of which is set out in full, which has already been referred to as the decree of September 10, 1866. This order or decree, after referring to the decree of June, 1865, and reciting that partition under it had not been made, and that an agreement had been made determining all the equities under it, proceeds:

"It is therefore ordered, adjudged and decreed by the mutual consent and agreement of said complainants, as well as the said defendants in this cause that the interlocutory decree above mentioned, together with all orders made under and by virtue of the same, be set aside; and by mutual consent and agreement of said parties it is hereby further ordered, adjudged and decreed that the said Lucien B. Maxwell, one of the defendants in this cause, pay to the said complainants the sum of \$18,000, to be divided among them, [one-third each to Scheurick and wife and Hicklin and wife], * * * to Charles Bent, Julian Bent and Alberto Silas Bent, the children and heirs of Alfred Bent, the remaining third part to be equally divided among the last named and to be paid into the hands of Guadalupe Bent, widow of the said Alfred Bent, deceased, and guardian *ad litem* for said children for the purposes of said division.

"And upon the further consent and agreement of the said parties it is hereby further ordered, adjudged and decreed that the said [Scheurick and wife and Hicklin and wife and] Guadalupe Bent, guardian *ad litem* for Charles Bent, Julian Bent and Alberto Silas Bent, children and minor heirs of the said Alfred, deceased, within ten days from the day of the date of this decree make, execute and deliver to said Lucien B. Maxwell good and sufficient deeds of conveyance of all their right, title, interest, estate, claim and demand of, in and to the lands in controversy in this cause."

It is further found that the foregoing order or decree was not made by the personal procurement, knowledge or consent of said Scheurick or Guadalupe Bent, and that the fact of its entry was unknown to them till several years thereafter; that no pleadings, orders, or proceedings other than those recited appear in the record in said cause; that the record does not show whether or not any inquiry was made by the court or by its authority touching the value of the said premises or the interest of the said infants therein, or as to the necessity of disposing of the same, or as to the other estate of said infants or the ability of the mother to educate and maintain them, or touching the propriety, necessity or advisability of such sale and conveyance of their interest, nor does there appear of record any motion, petition or showing

against the propriety of the original decree vacated by said decree of September, 1866.

It is further found that the grant contains about 1,700,000 acres, that part lying in New Mexico embracing some of the best and most valuable lands in the territory, including large areas of grazing and tillable lands, and is traversed by several streams furnishing water for irrigation, a small part of which was cultivated in May, 1866; that it also contains large bodies of timber and was known in May, 1866, to contain considerable coal deposits, and was then believed and has since proven to have considerable deposits of precious metals, including gold and silver; that at that time, and for several years after, there was no such demand for or sales of undivided interests in lands of the quantity, character and location of these as to create an ascertainable market value; that from the testimony it is impossible to satisfactorily fix a market value in 1866, opinions of witnesses varying from 2 1-2 cents to \$1.25 per acre, its value being largely speculative for the future.

It is further found that said Guadalupe Bent is a Mexican woman, and in May, 1866, was unable to read, write or speak the English language, and unfamiliar with her duties as guardian *ad litem*; that she was without knowledge of the boundaries, extent, character or value of the grant or the act of congress confirming it, or of the particulars of the decree of June, 1865; that Maxwell represented to

Scheurick that the grant was not as large as it was supposed to be; that it did not extend into Colorado or beyond Red river, when it did so extend over 200,000 acres; that said Scheurick and Guadalupe Bent believed and were influenced by those representations; that said Maxwell, while generous and magnanimous in many respects, was unscrupulous and tyrannical, and a resolute and determined man, and at that time a man of large wealth and great power and influence throughout the country and territory, as was known to said Guadalupe Bent, and he exercised his power and influence in such way that the weak feared to oppose him in matters of personal concern; that Guadalupe Bent was influenced in part in executing said conveyance by this known character of Maxwell; that he made threats that unless the Bent heirs accepted \$18,000 for their claims they would never get anything, and that no one should occupy any part of his grant, and these threats were communicated to her and influenced her in making the said conveyance to him; that the conveyance was in the English language and was never interpreted or read to her.

But it is further found that it appears the means of knowledge of the extent and value of said grant were open to the Bent heirs and their counsel; that the boundary between Colorado and New Mexico was not then definitely known; that Guadalupe Bent acted in concert with the other adult

parties who dealt with their own interests on the same terms, and she was willing to make the same settlement that they did; that Scheurick and counsel for the Bent heirs could read and write both the English and Spanish languages; that when Guadalupe Bent executed the deed to Maxwell she understood there had been a settlement with him by which the interest of the Bent heirs were to be transferred for \$18,000; that she understood that the document was a transfer to Maxwell of the interest which had belonged to her husband; that the settlement was satisfactory to her; that she supposed the document had been arranged by Scheurick with Maxwell; that she had relied on Scheurick and was willing to do as he thought best; that she believed she had authority to convey and intended by the deed to convey to Maxwell the interest in the grant which had belonged to her husband; and the court finds that no fraud, imposition or error has been shown to have entered into said transaction or to have brought about said compromise decree.

It is found that no money was paid by Maxwell to any of the parties at the time they made their deeds, and that instead notes were given payable one year from date; that Guadalupe Bent received a note for something over \$5,000; that at the beginning of this suit a considerable sum not definitely ascertained remained unpaid on this note; that Guadalupe delivered it to her husband George W. Thompson with her other property when she

married him, about thirteen months after her husband's death; that it does not appear that any part of the proceeds of the note was paid to the children of Alfred Bent or their mother, but said Thompson maintained and educated them during their minority after he married their mother, with the funds of his wife and himself, the same as his own children, keeping no account; that upon the execution and delivery of the deed by Guadalupe Bent May 3, 1866, Scheurick and his wife assumed for complainants in said original suit payment of the fees of counsel therein and paid the same, *pro rata* amount being deducted from the notes given said Guadalupe Bent and Mrs. Hicklin; that there is no evidence that such counsel or other counsel were afterwards retained by Scheurick or other of the complainants, and the record of said decree of September, 1866, does not disclose what attorney appeared or assumed to appear for complainants and consented to making said order.

It is further and finally found that the inventory before referred to and set out shows that, excluding real estate and the note of L. B. Maxwell (for \$5,000), the total assets of the estate were \$1,408, and the debts mentioned in the will, with additional claims allowed, amounted to \$2,425, but witnesses familiar with said Bent's affairs testify that at his death he had both real and personal property other than that mentioned, both in New Mexico and in Colorado.

Opinion of the Territorial Supreme Court.

The opinion of the Supreme court of the territory in support of its judgment affirming the decree in favor of complainants and appellees, appears in the record at page 136. This opinion is very brief and does not attempt to give the grounds of the judgment, but refers to the decision in another cause decided at the same term (Charles Bent *et al.* vs. Guadalupe Miranda *et al.*) in which these defendants and appellants are complainants, and these appellees and others are defendants, in which an opinion is filed setting forth the particular grounds of the court's decision. Substantially the same questions both of law and fact are presented in both cases and by stipulation both were submitted together in the District and in the Supreme court. By their bill in the other suit the children and heirs of Alfred Bent seek the vacation of the order or decree of the District court entered September 10, 1866, the cancellation of the deed by their mother Guadalupe Bent of May 3, 1866, and the enforcement, to the extent of their interests in it, of the decree of June, 1865, establishing their father's interest and directing it to be partitioned. The judgment of the territorial court in that suit was also adverse to them, from which an appeal is pending in this court, and stands for hearing at this time, being No. of this term. The opinion to which reference is made appears in the

printed record of the other case at pages 81-6, and we suppose should be considered in determining this appeal.

Justice Collier, who writes the opinion in the other case, places the judgment of the court upon these grounds: (1). That the decree of June, 1865 was interlocutory and was therefore subject to the control of the court in 1866, and could be vacated without depriving the infant heirs of Alfred Bent of any legal rights. (2). That the decree of September 10, 1866, was a mere modification of the decree of June, 1865; "that is to say, so far as the adult complainants were concerned it was entirely abrogated, and so far as the infants were affected, it dismissed only the partition part of the former decree, even if it did that much." (3). That the decree of June, 1865, being interlocutory and nothing being *res judicata* under it, the complainants in whose favor that decree had passed had nothing more (if anything) than an equitable estate in the premises. (4). That the interest of the infant complainants in that suit being a mere equitable right, a court of equity had the legal discretion and jurisdiction to dispose of it, if deemed for the best interests of the infants; and the fact that that decree is based upon consent, when the infants were incapable of giving consent, did not affect the discretion of the chancellor in the premises; nor does the recital in the decree of consent "operate to show it was based on that alone;" that it will be presumed

there was a reasonable exercise of discretion for the benefit of the minors. (5). That no fraud, imposition or error is shown to have entered into the transaction, though under the evidence taken since the decision of the court in *Maxwell vs. Thompson*, 96 U. S. the court cannot say the proofs support the conclusion that the terms of the compromise were advantageous to the infants.

ASSIGNMENT OF ERRORS.

And the said Guadalupe Thompson, administratrix; George Thompson, Charles Bent, Alberto Silas Bent, and Julian Bent, come now and say that in the record and proceedings of the Supreme court of New Mexico and in the final decree of said Supreme court manifest error hath intervened in this to-wit:

I.

It appears by the record and proceedings aforesaid that the decree of the District court in and for the said county of Colfax was by the Supreme court of the said territory of New Mexico in all things affirmed, whereas the said decree given in the said District court in and for the said county of Colfax was erroneous and ought to have been reversed.

II.

Also in this, to wit, that the facts found and declared by the Supreme court of the territory of New Mexico are not sufficient to sustain the decree given in the Supreme court of the territory of New Mexico for the decree given in the District court of the

county of Colfax aforesaid, but, on the contrary thereof, upon the facts found by the Supreme court of the territory of New Mexico, the decree given in the District court in and for the county of Colfax, in said territory, in favor of the said appellees and against these appellants ought to have been reversed and declared for naught.

III.

That in and by the said record and proceedings it doth appear that by a certain final decree made and given in the District court in and for the county of Taos, in the territory of New Mexico, on the 3rd day of June, 1865, Alfred Bent, ancestor of the now defendants, and appellants Charles Bent, Alberto Silas Bent, Julian Bent, was vested with one undivided twelfth part and share in the premises named in the bill of complaint of the said appellees, plaintiffs in the District court of the said county of Colfax, and the decree afterwards, at the September term, 1866, given in the said District court in and for the county of Taos, assuming to vacate, annul, and set aside the final decree so given on the 3rd day of June, 1865, was and is erroneous and void as against appellants, and decree ought to have been given in the District court in and for the said county of Colfax dismissing the bill of complaint of the said appellees out of the said District court, whereas in and by the said record and proceedings it doth appear that final decree was given in the District court in and for the said county of Colfax in accord-

ance with the prayer in the complaint of the appellees, plaintiffs in the District court of the said county of Coifax and by the decree given in the said Supreme court in the territory of New Mexico the final decree so given in the said District court in and for the county of Taos on the 3rd day of June, 1865, was declared to be interlocutory, and in and by the judgment, decree, and opinion of the Supreme court of the territory of New Mexico it was declared that the decree entered at the September term, 1866, of the District court in and for the said county of Taos, assuming to vacate, annul, and set aside the said former decree of that court on mere consent of parties, not showing or setting forth who assumed to represent or consent for the defendants and appellants herein in that behalf, and no evidence being heard touching the matter, was and is nevertheless effectual to vacate, annul, and set aside such former decree in favor of plaintiff's ancestor, the said Alfred Bent.

Wherefore, for the errors aforesaid and the manifold other error in the said record and proceedings and in the decree of the said Supreme court of the territory of New Mexico appearing, the said Guadalupe Thompson, administratrix of the estate of Alfred Bent, deceased; George Thompson, her husband; Charles Bent, Alberto Silas Bent, and Julian Bent pray that the decree of the Supreme court of the territory of New Mexico and the decree given herein in the District court in and for the

county of Colfax may be reversed, annulled, and altogether held for naught, and that appellants be restored to all things which by virtue thereof they have lost, and they also pray that decree be given for their costs in this behalf expended.

ARGUMENT.

We submit, at the outset, that there cannot be evolved from this record any theory consistent with the principles of equity jurisprudence upon which this decree can be supported. Considered in its entirety, the proceeding has been a medley of inconsistencies and contradictions, for which it is no less remarkable than for the duration of the contest, and the fervor and persistency with which it has been waged. The bill, as originally brought, and under which the complainants secured their first decree, proceeded upon the theory that the orders of the court, through which their title had come, were in part without jurisdiction, and in all respects irregular and ineffectual to divest the title of the infant heirs of Alfred Bent. A fundamental error set forth was that the contract for the sale and conveyance of the interest decreed to Alfred Bent was by mistake treated as having been made by his children, when in fact it was made by himself just prior to his death. The theory of the bill, therefore, was

that Alfred Bent having made a contract of sale, and his representatives having actually received the purchase money and made a conveyance, these facts should be judicially ascertained, and a decree made that the title had passed by reason of such contract, conveyance and payment. The bill distinctly declared that the court had no jurisdiction to direct a conveyance by the guardian *ad litem* of the infant children of Alfred Bent, or to vacate the decree of June, 1865, establishing his rights. The decree entered in complainants' favor under this theory was reversed by this court, mainly on the ground that the proofs failed to sustain the material allegation that Alfred Bent made such a contract in his lifetime, and for the further reason that having consented to or procured these orders, that they could not afterwards maintain a bill to review or vacate them. The amended bill filed after the cause was remanded strikes out all averments as to the void and irregular character of the orders before assailed; and, instead of seeking to have them vacated as a cloud, now seems to set them up as a source of title. But, impliedly at least, there is yet a recognition of infirmity in these orders; for it is declared that complainants "are advised that in the proceedings in the suit aforesaid it is doubtful in law whether, as against said minor children and heirs of the said Alfred Bent, it sufficiently appears that they have no equitable or other interest in the premises." (Rec. p. 69, fol. 121). There is no averment or sug-

gestion, however, as to what or wherein this infirmity consists.

After setting forth the order of April 13, 1866, appointing Guadalupe Bent guardian *ad litem*, etc. it is alleged that "thereupon such proceedings were had" as is shown in what is designated as the consent decree, directing a sale and conveyance of the interest in question, and the vacation of the decree of June, 1865. The fact is, as disclosed by the exhibits to the amended bill, as well as by the findings of fact by the court, that this order was made about five months later than the other, and four months after the deed contemplated by the first order was made by the guardian *ad litem*. It was contended on the argument in the lower court that this order was probably intended to be entered at the same time, and as part of that of April 13th. But manifestly it was an after-thought of Maxwell's counsel who took leading parts in the comedy of errors then being enacted in connection with the acquisition of the title of Alfred Bent's children. This order bears no relation to, and has no connection with, the other, being distinct and disconnected from it by the express continuance of the cause on April 13th to the next term of the court. The last, or September, order was an evident recognition of the invalidity of the previous one as authority for the conveyance of the estate, and an attempt to authorize the making of another, and if that could not be secured, to destroy the rights the infants had in the grant, and

thereby vest Maxwell with complete title.

The deed made by Mrs. Bent, dated May 3, 1866, reciting the order appointing her guardian *ad litem*, etc. with "power to execute deeds or carry into effect all sales," had already conveyed the interest of her children, or it had not. If the former, the decree of September was wholly nugatory in its effect upon the title, for there was nothing for it to operate upon; and if the latter, the decree could not be relied on as a source of title. If the deed made under the first order did not convey the title (and complainant's original bill expressly declares it did not, and their amended bill does not assert it did) it was because Mrs. Bent's children had no capacity, and she no authority, to make such sale or conveyance. Nothing is said in the order of April 13th as to price or terms, or as to the necessity or propriety of such sale. A sale is not even directed, the order only assuming to empower the guardian *ad litem* to execute a deed or carry into effect contracts of sale already made, leaving the essential matters of price, terms, conditions and propriety of the sale to the supposed contract already made for her children, or to her discretion. If neither of these orders, by its own force, divested or authorized the transfer of the title, both combined did not; for, as we have seen, they are distinct in substance and widely separated in time. And if these orders are of doubtful interpretation or effect, whether by reason of their inapt language or the times when they were en-

tered, they should be construed most strongly against appellees; for the court expressly finds that the first two, the one entered April 11th, substituting the infant heirs of Alfred Bent as co-complainants, and the other April 13th, appointing Mrs. Bent guardian *ad litem*, etc. were entered in accordance with the wish of Maxwell or his counsel. (Rec. p. 125, fol. 226). And the last, or September, order, directing, by the recited consent of parties, a sale and conveyance for six thousand dollars, was entered without the knowledge, procurement or consent of either of the complainants in that suit. (Rec. p. 130, fol. 235). It further appears from the findings of fact that the relation of attorney and client between the heirs of Charles Bent and the attorneys who had before represented them, ceased at the time the deed was executed by Mrs. Bent, May 3, 1866, and that there is no evidence that they or other counsel were afterwards retained; and the bill alleges the consent was given by solicitors. (Rec. p. 68, fol. 119). So that the consent recited was not only by counsel, but by counsel without authority to represent any of the plaintiffs in that suit. It is more than intimated, even by the amended bill, that the orders of the court and the deed by Mrs. Bent are not relied on as valid; for, after referring to them, it alleges "so far as the same could lawfully be done under and by virtue of the said orders," the deed of Mrs. Bent terminated the interest of Mrs. Bent's children in the premises.

The real basis for the claim that the interest was terminated seems to be the alleged fact that their share of the contract price had passed to them; for it is alleged that the said sum of six thousand dollars "has passed into the hands of the personal representatives of the said Alfred Bent," and that "the said agreement has been fully performed by said Lucien B. Maxwell, and complainants are *therefore* entitled to hold the premises free and discharged from said trust." (Rec. p. 69, fol. 121).

If, then, any theory be deducible from the bill it would seem to be this: That notwithstanding the incapacity of the infants to enter into the contract, or to consent to a decree affecting their interest, and although the orders of court were so irregular and invalid as to confer no authority on Mrs. Bent to contract for them, and her deed was therefore ineffectual to transfer their interest; yet, because this invalid and unauthorized contract had been executed by the making of a deed and the payment of the consideration, the title of the infants should be decreed to have passed, and that of the Maxwell company quieted against them. This allegation of payment, evidently deemed an important if not a pivotal one in the estimation of the counsel who drew the bill, is put in issue by the answers. And it is found by the court that no money whatever was paid at the time Mrs. Bent made the deed, only a note for about five thousand dollars being given; that at the time this suit was commenced a

considerable sum, not definitely ascertained, remained unpaid on the note; and that no part was paid to the children or their mother. (Rec. p. 134, fols. 238-9). The legal effect of these findings is not qualified by the further finding that Mrs. Bent afterwards delivered this note with other property to her second husband, whom she had married about a year after it was given, and that the children were brought up in his family as his own. Though not so stated in the bill, we may assume that the allegation of payment imports a payment in cash to some one authorized to receive it for the infants, and under legal responsibility to apply it to their use, otherwise it would be no payment at all. Payment under an order of court means cash and not a note. Surely it would not be sufficient to sustain this allegation to prove that Maxwell gave a note and ultimately paid a part, or even the entire amount, to a stranger to the note and to the transaction, who was under no responsibility to pay the money to the children. It is only by implication that it can be said from the findings that any part of the note had been paid to any one. Independently of the rule in equity that in such cases as this it is the duty of the purchaser to see that the purchase money is properly applied, or reaches the person whose benefit it is paid; (2 *Perry on Trusts*, §§ 790, 796), it is submitted that the proofs and findings palpably fail to sustain this material averment of the bill. Under the rule referred to

and the facts in this case, Maxwell was under special duty, not only to pay the consideration in cash, but to pay it to such person and under such conditions as would secure to the infant beneficiaries the use and enjoyment of it. Even if Mrs. Bent, under the terms of the order of May 13th appointing her guardian *ad litem* and commissioner, had been empowered to execute a valid deed, which is not claimed, she would not by virtue of that appointment have been authorized to receive payment for the interests conveyed, either by note or in cash. She was not the guardian of the children's estate, and could have exercised no authority and was under no legal responsibility as such. Maxwell surely had notice of all the facts which imposed upon him the duty to see that the children received the money; for under the findings of fact he conducted the negotiations and initiated and prosecuted the proceedings which gave rise to this litigation, and knew the utter helplessness of those whose interests he was seeking to acquire. He knew that they were not only in contemplation of law but in fact infants, the oldest being about six years of age and the youngest a mere babe. (Rec. p. 118, 213).

We submit that when Maxwell under such circumstances comes into a court of equity asking that an apparent title in those infants be declared divested because he has taken an ineffectual deed under irregular court proceedings, but has actually in good faith paid them for their interest, he should

at least make strict and clear proof, not only that the alleged consideration has been paid and fully paid, but that it was paid to one authorized to receive it and under legal responsibility to them to apply it to their use.

But it may be said that a consistent theory is not essential to a bill of this kind, and that it is sufficient if the proofs disclose a case entitling the complainants to have their title quieted. This seems to be the view of the territorial Supreme court,

For the Decree of September, 1866,

is treated as a sufficient basis for the judgment. It is declared in the opinion by Justice Collier that the court had plenary power to dispose of the interests of the appellants, and did so by that decree, and that this appears upon the face of the decree, taken in connection with the legal inferences to be drawn from it. And this, notwithstanding the record shows the basis of the decree was consent, and that the interest of infants was involved. No attempt is made to add to the record in that case, and no supplementary act is required to be done under the decree appealed from. In substance, it is held that the order, by force of its own terms, divested the title of the infants and transferred it to Maxwell. We submit that this estimate of the effect of the order will not bear scrutiny. The claim is that a court of equity not only has inherent power and authority to dispose of the interest of

infants in real estate, but because such disposition was ordered it must be presumed, and conclusively presumed, that the court judicially considered and determined that it was for the advantage of the infants that their interests should be disposed of on the terms named in the order. There is no recital in the decree that an application had been made to the court by anyone, authorized or unauthorized, for such a order; and it is expressly found in this suit that the record in that discloses no petition, pleading or motion of any kind assailing the original decree or asking any other order in the case. (Rec. p. 130, fol. 235). The order was made in a suit brought to establish the title of Bent's heirs to an interest in the grant, and this result had already been achieved when the order was entered, which not only attempts to set aside this adjudication in their favor, but requires them to convey the interest decreed to them. Had a suit been instituted by the guardian of the estate of these infants, representing that the estate was liable to be lost or wasted, or that the sale was necessary to their maintenance and education, and setting forth its value and asking authority to sell it for such a price, a very different question would be presented, both as to the jurisdiction of the court and the presumption that proofs were heard and that it was found to be to the advantage, or necessary to the support of the infants, that a sale should be made. But there was no such proceeding, and no such representation,

Nor is there any other basis for the judgment than the recited consent of the parties. There is no intimation that there was a previous inquiry, or that there was any finding that it was for their advantage that their interest should be sold at all or at any price. Conceding, for the moment, that without statutory authority a court of equity has inherent jurisdiction to order the sale of real estate of infants when it is necessary for their maintenance, or when it is to their advantage for some other reason, we submit that this jurisdiction does not exist and cannot be exercised until a proper proceeding has been instituted and the facts which call for the exercise of the jurisdiction have been presented to the court in a pleading or petition by some one taking responsibility therefor. It will not be contended we suppose that without a proceeding instituted for that purpose, in which the necessary facts have been set forth and his jurisdiction invoked, a chancellor may go upon the bench and on his own motion enter such an order as was made in this case. When jurisdiction of the person and the subject matter has attached, presumptions are indulged that facts justifying the judgment were proven or found; but presumptions cannot supply jurisdictional facts. These principles have long been recognized and frequently applied by this court.

Thatcher vs. Powell, 6 Wheat. 116, 125.
Comstock vs. Crawford, 3 Wall. 396, 404,
405.

Galpin vs. Page, 18 lb. 317, 364, 366.

United States vs. Ross, 92 U. S. 281, 284.

Rich vs. Town of Mentz, 134 U. S. 632,
641.

The fact that in some of these cases the jurisdiction of the court was statutory does not detract from their force as authority; for if a court of general jurisdiction may only act upon a particular state of facts, those facts must be brought into the record by pleading or averment. They cannot be supplied by presumption. Especially is this true where the judgment or record states a particular ground of jurisdiction and that ground is not sufficient. The opinion of the learned justice of the territorial Supreme court, however, declares that the recital in the order under consideration that it was based upon the consent of the infants does not preclude the presumption that there were other and sufficient grounds for the exercise of jurisdiction, and that such presumption will be indulged. This, we respectfully submit, is not the law. When it is recited that such an order was entered on the consent of the infants, there is no room left for presumption that it was made on petition setting forth the requisite facts, and that such facts were found on the hearing. This is expressly ruled by this court in Galpin vs. Page, *supra*. It is there said: "Presumptions are only indulged to supply the absence of evidence or averment respecting the facts presumed. They have no place for

consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence, or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred."

The jurisdiction to make the order is contested, and the court finds that the record discloses no petition or motion, no reference to a master and nothing else than the recital of consent in the order as a basis for making it. This being a bill asking, we must assume, relief based on this order, it is not only incumbent upon the complainants to sustain its validity, but it is the privilege of defendants to assail it, and they have successfully done so upon every ground relied upon in their answers, including that of fraud and imposition, as we shall hereafter attempt to show.

We do not understand the learned justice who prepared the opinion of the territorial court to contend that the consent of infants can bind them by contract or form the basis for a valid decree affecting their interests. Nor do we apprehend that counsel for appellees will make such contention. If these infants could not consent to a decree against themselves, or make a binding contract, they could not authorize an attorney or any other person to consent or contract for them; nor could their guardian

ad litem, or general guardian, if they had had one, bind them by waiving any of their rights. Consent cannot be the basis for a judgment affecting the rights of infants, no matter by whom or how solemnly given; nor can a judgment which affects them be taken by default, or except where they are represented by guardian *ad litem* and upon proofs taken.

Tyler on Inf. and Cov. p. 173.

Tuttle vs. Garrett, 16 Ills. 354.

White vs. Miller, 158 U. S. 128.

But, as we have already had occasion to say, the court finds as facts that the order in question was entered without the personal procurement, knowledge or consent of any of the complainants in that suit, and about four months after the relation of attorney and client between them and the counsel acting in the suit prior to May 3, 1866, had ceased, and when no other counsel had been retained. The inevitable conclusion must be that the consent recited, if given at all, was by counsel unauthorized to act for these infants, and was procured to be made and entered by Maxwell, and the court to that extent imposed upon.

In *Ex parte Jewell*, 16 Ala. 439, a trustee of real estate held for the use of the wife of the grantor and her minor children, applied to a chancellor with the wife's concurrence, for authority to sell the estate, on the ground that he and the *cestui que*

trust had removed from the state, and that it was inconvenient to administer the trust, and in general terms alleging that it would be to the advantage of all concerned to sell and reinvest the proceeds. While admitting the jurisdiction of a court of equity in that state, without statutory authority, to order a sale of the real estate of infants in a proper case, the Supreme court says: "Yet I confess I have not been able to find a case in any of the English books where a sale of real estate of infants has been ordered on the ground alone that it would be for the interest of the infants, unless connected with the further reason of paying the debts or providing maintenance for the infants." It is further declared: "But then the facts which render the sale necessary should be alleged as well as proved, that the chancellor may clearly see that the interest of the infant would not be prejudiced, but, on the contrary, promoted by the sale * * * It is true the petition alleges it would be greatly to the interest of the beneficiaries to sell the land, but the proof shows no necessity for the sale. The proof should go further and show the condition of the property, what it now yields, the expense incident to the management and keeping of it in repair, and also show that the value of it could be invested more profitably for the benefit of the minors." The bill was ordered dismissed. In the later case of *Crawford vs. Cresswell*, 55 Ala. 497, a devisee of an estate held for his and his minor children's use, filed

a bill asking authority to invest a part of it in a home, on the ground that it would be for the interest of the family in their necessitous condition. All parties consented by counsel, and the infants, by their guardian *ad litem*, filed a written consent as well; and upon this consent, without order of reference or proof, the chancellor ordered the investment. On appeal, the Supreme court reversed this judgment, dismissed the bill, and say: "The averments should show facts, not merely conclusions, why the interest in remainder will not be prejudiced, if they should not go further and show that they will be promoted by the change; these averments must be proved by testimony that is at once intelligent and reliable and free from all imputation of bias." Surely a no less, but more rigid, rule as to allegations and proofs as a ground for such an order should be required when authority for the conversion of real estate into personlty is sought.

But the court had no power to make the order in question without legislative authority on the subject, and at that time there was no such legislation in New Mexico. The power to sell the real estate of infants, even upon petition for that purpose by a general guardian, averring the necessities of the infants, is not inherent in courts of equity. The Supreme court of the territory in May, 1884, so held with reference to the very order in question. (*Bent vs. M. L. G. & Ry. Co.* 3 N. M. 158, 170-2). This ruling was made on appeal from the judgment

of the District court sustaining a demurrer to the bill filed by these appellants against these appellees in which the same questions are presented as are raised by the answers to this bill. It is there expressly held that independently of particular grounds of irregularity in the proceeding, the order in question was void for want of jurisdiction by the court of the subject matter.

This decision was based partly on the judgment of this court in *Williamson vs. Berry*, 8 How, 498, 551, in which it appears that the legislature of New York had by a private act authorized one Clark who, with his minor children, was the devisee of certain real estate, to sell a part of it to maintain them and himself under conditions to be named or approved by a court of Chancery. A chancellor ordered a sale under this act, and after the minors attained their majority it seems an action was brought to recover their interest in the property. The report of the case is quite voluminous, but this court held the sale void as against the infants, because not made in pursuance of the directions of the act, the chancellor having no authority in the premises except that given by the act. Mr. Justice NELSON dissented on grounds not affecting this question; but he distinctly recognized, with the majority of the court, the necessity for legislative authority in such cases. He says: "The management and disposition of the estates of infants * * * are among the mass of powers

upon this subject which belong to the original and inherent jurisdiction of the court of Chancery. They relate to their personalty and the income of their real estate, the court having no inherent power to direct a sale of the latter for their maintenance or education; that power rests with the legislature.” * P. 556.

In 1872 an act was passed by the legislature of New Mexico conferring such jurisdiction upon the courts of the territory as was attempted to be exercised in this case in 1866 (Prince's Stats. p. 485). The territorial Supreme court in the case cited well say that the act was a clear recognition of the necessity for legislative authority in such cases. It is believed now that there is no state in the Union in which the jurisdiction to sell real estate of infants is not given, and its exercise regulated, by statute, and in nearly all it is limited to their necessities or the preservation of the property. In the earlier history of adjudications on this subject in those states, in which it was held that legislation was not essential to the jurisdiction, the question generally arose in cases where persons *sui juris* were jointly interested with infants in the property, and had a right to demand a sale, as in the administration of estates, partition, assignment of dower, etc.; and in many cases the jurisdiction will be found to be based on authority implied from legislation on other subjects. But even in such states, as we have seen, the rule is that sales should not be ordered unless

the jurisdictional facts that a necessity exists for the sale be shown by clear, precise averment, and supported by convincing proofs.

Elsewhere, in connection with the consideration of another question passed upon in the decision cited from the territorial Supreme court of New Mexico, we contend, as we did in the lower court, that whether a correct declaration of the law or not, that decision became the law of this case, which neither the District court nor the Supreme court could review, ignore or reverse. In answer to this contention counsel for appellees argued, as will probably be done here, that the law of the case is to be found in

The Previous Decision of this Court.

Though this view is not in terms adopted in the opinion by Justice Collier, such reference to and reliance upon that decision—*Thompson vs. Maxwell*, 95 U. S. 391—is made as to call for an examination of what is said in the opinion, and the grounds of the decision. The original suit, it may be fairly stated, was based upon the allegations of fact that the alleged contract of sale was made by Alfred Bent in his lifetime and not by his infant heirs after his death, and that the contract had been fully carried out by Maxwell paying the purchase price. There was a further declaration as to matters of law, that by reason of the recitals in the orders of April and September, and other irreg-

ularities, such orders were void. The allegations of fact were denied by the answers, and the declarations as to matters of law were of course concurred in. When this court found that the allegation as to the making of the contract was not sustained by the proofs, the bill and the decree entered under it were left without support. No further finding or decision by this court was necessary to the judgment of reversal; but, inasmuch as it appeared to the court by the bill and the recitals of the order itself that the decree of September, 1866, was entered by the consent of complainants, this court held, as a further ground for reversal, that they could not maintain a bill to review, or vacate it. But the learned Justice (BRADLEY) who wrote the opinion indulged in reflections and suggestions which were not called for in the case, and which we submit were *obiter*. It is there said: "A decree for carrying out a settlement and compromise of a suit is certainly not of itself erroneous;" and this further suggestion is made: "And if instead of seeking to reverse the decree of September, 1866, (which for like reasons of public policy as applicable to the security of judgments that have passed into *rem adjudicatum* is not allowed) the decree had sought to carry that decree more effectually into execution, it would have been free from legal objection, and equally conducive to the object in view." The question before the court was, what had been done, and not what might be done; and after quoting

Redsdale's Treatise to the effect that where it "becomes impossible to carry a decree into execution without further decree of the court, a bill may be maintained to carry it into execution;" the opinion further says: "Now in order to execute this decree, or determine whether it has or has not been substantially executed, and to determine and declare the effect of such execution upon the rights of all concerned, and thus remove any cloud from the title arising from the imperfection of the proceedings, it is competent for the parties to file a bill conceived and constructed to that end." The expressions quoted were not applicable to the case then before the court, but were outside of and beyond it.

Chief Justice MARSHALL, in *Cohens vs. Virginia*, 6 Wheat. 399, 401, referring to expressions of similar character in the opinion in another case, stated the accepted rule on this subject, and the reason for it in concise terms: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but should not control the judgment in a subsequent suit where a different point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. The principles which may serve to illustrate it are considered in their re-

lation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The amended bill and answers in the case at bar present a wholly different case from that heretofore before this court, and raise numerous issues which were not presented, or even suggested, under the original pleadings. Certainly the expressions we have quoted cannot be accepted as a decision of this court that under the amended pleading, and issues presented, and facts found, and questions of law raised, a decree should be entered declaring that the territorial court had jurisdiction without legislation to order a sale of the interest of these infants; or that the infants or their guardian *ad litem* had capacity or authority to consent to such decree; or that they did in fact consent or attempt to do so; or that such consent was fairly and legally obtained, or made to appear to the court; or that counsel assuming to appear for them had authority so to appear and consent; or that there is a conclusive presumption, which cannot be overcome by proof, that a petition was filed representing that it was necessary or to the advantage of the infants that their interests should be sold; or that these essential facts were shown by proofs.

The inapplicability and inconclusiveness of a prior judgment as an estoppel, or otherwise, in such cases as this are illustrated in *Nesbitt v. Independent District of Riverside*, 144 U. S. 610, 619-21, and *W. & W. R. Co. vs. Allsbrook*, 146 U. S. 279. In the

first case was involved the question of the liability of the defendant on bonds on some of the same series of which a suit had been maintained. The bonds recited that they were regularly and duly issued according to law. In a subsequent suit the new element of notice of the facts rendering them invalid was brought home to the holder. It was claimed that the judgment in the first suit was conclusive in the second. But this court held otherwise. Mr. Justice BREWER delivering the opinion of the court says: "In this action notice is proved and an additional fact put into the case which makes a new question. The effect of recital is one thing; that of recitals coupled with notice is another. The one question was litigated and determined in the Des Moines suit; the other is presented here. Surely an action as to the effect of one fact does not preclude in a second suit an inquiry and determination of that fact in connection with others. Infancy is pleaded in an action on a contract, and an allegation is made establishing it as a defense. In a second suit between the same parties on a different cause of action, though created at the same time, may not the plaintiff prove a ratification after majority?" In the second case referred to, a suit had been brought in North Carolina involving the exemption from taxation of the property and franchises of the defendant company, the particular property involved being partly what had been acquired from another railroad company whose prop-

erty was not embraced in the exemption. This fact either did not appear or the distinction between the main line of road and its branch was not taken account of or considered in the first decision. It was held in the first suit that the property was exempt. In the second suit, in which it was claimed that the property of the branch road was not included in the exemption, it was argued that the prior decision of this court was conclusive upon the question. The contention was not allowed. It is said on this point in the opinion by Mr. Justice FULLER: "These proceedings are relied upon as an estoppel so far as the road from Halifax to Weldon is concerned, or as controlling authority in the premises. We think they cannot be so regarded. The causes of action are not identical, and the points or questions litigated are not the same. The distinction between the road from Halifax to Weldon and the main road from Wilmington to Halifax, was not adverted to, and if that question might have been raised, this suit being upon a different cause of action, the judgment in the former case cannot operate as determining what might have been, but was not, brought in issue and passed upon." In the case at bar there was no occasion in the suit as originally brought for defendants to assail the validity of the orders or decrees of April and September, 1866; for complainants themselves declared them invalid, and in effect renounced any rights under them. By the amended bill they in effect declare upon them as

grounds for the relief prayed for; and thereupon they are assailed by defendants on many grounds both of fact and of law. We therefore submit that the decision of this court in *Thompson vs. Maxwell* cannot be invoked as an estoppel or an adjudication on this appeal of any question presented by this record.

The Character and Effect of the Decree of June, 1865.

The learned counsel for complainants, doubtful (if not conceding the lack) of power in the District court to order a sale of the interest of minors in lands, contend very earnestly and elaborately in the court below that the defendants in April and September, 1866, had no vested estate in the grant, but only an interest in a pending lawsuit in which an interest was involved. The basis of this contention was that the decree of June, 1865, was merely interlocutory. This view the learned justice of the territorial Supreme court seems to adopt in the opinion filed. For it is there stated that at the time the decree of September, 1866, was entered, appellants "had nothing more (if anything) than an equitable estate;" that the decree establishing their interest in the grant was merely an interlocutory order in a pending suit "with nothing in it that was *res adjudicata*." The basis for these contentions, or the test of their soundness, it would seem is found in the claim that the decree of June, 1865,

was not appealable, and was therefore subject to be vacated at the pleasure of the court at any time before the case was finally disposed of. It is assumed, apparently, that if the last proposition be maintainable the others follow as necessary conclusions. We challenge both the premise and the conclusions.

What is and what is not an appealable order or judgment is a vexed question in this and other courts. While not conceding that the decision of the question is at all necessary to the determination of this appeal, the insistence upon it by counsel for appellees and by Justice Collier justify us in giving it more attention than we think it is entitled to. It is submitted that decisions in strictly partition suits are not pertinent to the question whether the decree of June, 1865, was an appealable judgment or not. The chief object of the suit in which that decree was rendered was to have adjudged to the heirs of Charles Bent an interest in the grant, which was denied and refused them by Beaubien, Miranda and Maxwell. It cannot be said their right to partition was put in issue if it should be determined they had an interest in the grant. That followed as a matter of course, as incident to the judgment establishing the controverted right of ownership. The principal object of the bill could have been achieved without partition. Had the bill prayed that a conveyance be made of the interest decreed, instead of partition, the effect of the decree of June, 1865, as an appealable judg-

ment, would not have been essentially different from what it was. In strictly partition suits, whether actual partition may be made or a sale be necessary, may sometimes furnish occasion for controversy. But in this case there was and could be no question from the vast extent in acreage of the land that an actual partition was practicable. Hence everything remaining to be done under the decree establishing the interest, was in the nature of executing that decree. *Such specific directions as to the legal rights of the parties in the partition, and how the partition should be made, or the decree executed, are given as to leave nothing but ministerial acts to be done. (Rec. p. 115, fol. 117). It is hardly to be contemplated, therefore, that an appeal would not have been entertained by reason of the exceptional character of the case had one been taken from the decree in question. The actual partition and report by the commissioners could only have presented ministerial acts or matters of fact in compliance with the directions of the decree fully settling the legal rights of the parties, and a judgment confirming their report, would not have been reviewed and reversed on appeal to the Supreme court of the territory or to this court on questions of fact alone. To execute the decree would have involved not only months of labor by the commissioners and engineers, but thousands of dollars of expense. And this should surely not be required as a condition precedent to the right of

appeal, in which might be determined that no right of partition existed. The propriety of entertaining an appeal under conditions infinitely less onerous is recognized by this court in the leading case of *Forgay vs. Conrad*, 6 How. 202. That was a bill to set aside certain conveyances alleged to be fraudulent, and for an accounting of the rents and profits. On hearing, the conveyances were held to be fraudulent and an account ordered. One of the conveyances held to be void was made to Forgay, who appealed from the judgment against him, before the account was taken. It was objected in this court that the appeal was premature, and a motion made to dismiss it. Chief Justice TANEY, delivering the opinion of the court, said: "The question upon the motion to dismiss is whether there is a final decree within the meaning of the acts of congress. Undoubtedly it is not final in the strict sense of that word; but this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature." After citing previous decisions of the court, the learned chief justice proceeds: "The case before us is a stronger one for an appeal than the last mentioned [*Michaud vs. Girod*, 4 How. 503], for here the decree not only decides the title to the property in dispute, and annuls the deed under which defendants claim, but also directs the

property in dispute to be delivered to the complainant, and commands execution, and according to the last paragraph of the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the Master." The case at bar is a still stronger one for an appeal than either of the foregoing. Justice Collier cites *Perkins vs. Fourniquet*, 6 How. 206, which immediately follows *Forgay vs. Conrad*, in the report, referring to it as in strange contrast with the latter, assuming that different rules are announced in the two cases. But an examination of the cases leaves no ground for such an implied criticism. In *Forgay vs. Conrad* the accounting order was incidental to, and followed as a matter of course, the judgment declaring the conveyances void; whereas in the other case the object of the suit was an accounting. The suit was based upon the undisputed facts that the defendant had administered the estate of the mother of complainants, who were her heirs and entitled to an accounting. It was denied, it is true, that he had wasted or appropriated to his own use the estate, but whether he did or did not could only be made to appear on an accounting. The two cases were not at all analagous. It would be a reflection upon the court and upon the intelligence of the learned chief justice who wrote the opinion in both cases, in the latter of which he refers to the other, to say that the appeal was dismissed in one and retained in the other, when there was no essen-

tial difference in this respect between the two cases. Justice Collier refers to a later case by the same title (*Perkins vs. Fouruquet*, 16 How. 82) as the same case reported in 6th Howard on a second appeal, and as illustrating the trial court's repentance between the entry of an interlocutory order and final judgment. An examination of the cases by this title reported in 6th, 7th, 14th and 16th Howard will disclose the fact that the learned Justice is mistaken. Mrs. Bynum married Perkins and died intestate. Her children instituted several different suits in Louisiana and Mississippi for an accounting as to their mother's estate. The case decided in 6th Howard, 206, went up from the Circuit court for the eastern district of Louisiana, and that reported in 16th Howard, 82, from the southern district of Mississippi. In one of the cases which came to this court from Louisiana (7 How. 160) it was held, reversing the judgment of the Circuit court, that an instrument offered in evidence was a release by the heirs of Mrs. Bynum, and in another case a plea of former adjudication is sustained. It is probable that one of these decisions was brought to the attention of the Circuit court for the district of Mississippi between the time of making the order for an account and the coming in of the master's report, or at that time. The very meagre report of the case in 16th Howard, we submit, does not justify the inference drawn by Justice Collier that the trial court on its own motion, and because of his

conscious error in making an order for the accounting, set aside such order and dismissed the bill without motion or suggestion or facts found later in the hearing. There is no disposition to controvert the proposition that an order for an accounting is an interlocutory order, and that if it shall be made to appear to the court by motion, petition, or otherwise before final judgment that the party asking it is not entitled to such an account, the court may vacate its order and dismiss the bill. That, however, is in no sense the case at bar.

This question seems to have been an especially prolific source of contention in this court since the decision of the two cases to which we have referred. If it were as important in the case at bar as counsel for appellees contend, and the Supreme court of New Mexico indicate, it would be a profitless task for us to review and attempt to harmonize the numerous cases in which this question has been presented. This is measurably done by Justice BLATCHFORD in *Keystone M & I. Co. vs. Martin*, 132 U. S. 91, in which all the cases are classified and a few are examined. No rule of uniform application can be deduced from this review. As to the case before the court for decision it is said "The bill prays only for an injunction and account of the quantity and value of the ore taken from the land by the defendant. This injunction is granted but the account remains to be taken." It is held the appeal was premature. *Forgay vs. Conrad* is re-

ferred to in this case and in *Winthrop Co. vs. Meeker*, 109 U. S. 180, with approval, and especially in the latter case where Chief Justice TANEY's opinion is quoted at some length by Chief Justice WAITE. In the latter case a corporation had made a lease of mining property, and a minority of the stockholders brought suit "the object and purpose of which was to set aside as fraudulent and void the proceedings of the stockholders," authorizing the lease. On hearing a decree was entered declaring the lease void, appointing a receiver and ordering the lessees to account. Before such an accounting was had, an appeal was taken. A motion to dismiss the appeal because premature was denied by this court.

The features which distinguish *Forgay vs. Conrad* from *Perkins vs. Fourniquet* are clearly recognized and emphasized by several state courts of high character.

Jones vs. Wilson, 55 Ala. 50;

Graham vs. Harding's Exrs. 4 Dana. 559.

Arnold vs. Sinclair, 11 Mon. 556.

Sharon vs. Sharon, 79 Calif. 633.

B. & O. R. Co. vs. P. W. & Ky. Co. 17 W. Va. 812.

Kreitline vs. Franz, 106 Ind. 359;

Jackson vs. Meyer 120 Ib. 504;

Williams vs. Wills, 62 Iowa, 747.

Sharon vs. Sharon, *supra*, was a divorce suit in which the marriage was denied. A divorce was de-

creed and as ancilliary to that decree, the court ordered a division of the community property and appointed a referee to ascertain and report to the court its character and amount. An appeal was taken at this point, and in the Supreme court of California, a motion to dismiss the appeal because the judgment was not final, was denied. The court say at page 703: "Here all the issues necessary to determine whether or not plaintiff was entitled to a share in the community property, had been tried and determined by the court, and the court had determined the same and filed its findings thereon and judgment could be, and thereafter in due course of time was, entered thereon. All that remained was to carry that judgment into effect by making division of the community property as provided in the decision and the judgment which followed it. The judgment of the court on the issue involved was a final judgment."

B. & O. R. Co. vs. P. W. & Ky. R. Co. *supra*, was a condemnation suit where the defendant denied the right of petitioner to condemn the property in question because it was not subject to condemnation. The trial court sustained petitioner's right and an appeal was taken before the appointment of commissioners or the assessment of damages. The Supreme court of West Virginia held the judgment was appealable, notwithstanding the damages had not been assessed. While admitting the right of defendants to raise the question that the property was

not subject to condemnation on exceptions to the commissioners' report, the court say: "It is a practice which should be discouraged. In a condemnation proceeding the first question to be decided is, shall the land be condemned for the use of petitioner? And it is a better practice to determine this question before the commissioners to assess the value are appointed."

On error to the Supreme court of the same state, this court, in *W. & B.Co. vs. W.B.Co.* 138 U.S. 289, denied a motion to dismiss the appeal taken under like conditions, citing and approving the foregoing decision of the Supreme court of West Virginia. As to the propriety of such practice, Mr. Justice FIELD, who delivered the opinion of this court, says: "If the judgment had been different, all further proceedings would have ended. Being for the condemnation, the estimate of the compensation which was to follow was to be made by commissioners to be appointed, and might therefore be treated as being a different proceeding."

In *Dow vs. Blake*, 148 Ills. 76, it was urged in a suit upon a foreign judgment that it was not final, because it gave leave to the defendant to apply to the court for its modification as to the time of payment. But it was held that this applied only to the execution and not to the merits of the judgment, and that it was final.

In nearly all the cases in which this question has been presented in this or in state courts, it has

arisen on motions to dismiss appeals prematurely taken. In such cases courts may safely give the benefit of any doubt of the appealable character of judgment to the moving party, for a dismissal does not deprive the other party of his appeal at the conclusion of the case. But in some instances courts have taken the responsibility of holding appeals lost because not taken from judgments claimed to be interlocutory. In the two cases cited, *supra*, from Indiana, where title was denied in partition suits, it was held that an appeal from the judgment establishing the title, not taken within the statutory limit of one year, though in less than a year from the confirmation of the report of commissioners, was too late. To the same effect is *Lewisburg Bank vs. Sheffey*, 140 U. S. 445. In that case it appears that one Glendy executed to Mathews a trust deed to secure a debt to the bank, and afterwards a second deed to Sheffey and Bungardner upon the same and other property in favor of his creditors generally. The last instrument was first recorded. The bank advertised the property covered by its deed of trust for sale, and the trustees in the other deed applied for an injunction, on the ground that their deed gave them the prior right. This was contested by the answer, and at the hearing in May, 1878, the bank tendered an amended and supplemental answer setting up further defenses. The answer was refused and the injunction made perpetual, and commissioners, previously appointed, were ordered to dis-

pose of the property in accordance with a previous stipulation, and report to the court. In August, and after the adjournment of the May term of the court, the bank tendered its petition for a rehearing, on the ground that the court had erred in rejecting its supplemental answer. The hearing on this petition was continued from time to time, and at last granted, the decree of May, 1878, vacated, and the answer, at that time rejected, was allowed to be filed. Under it additional testimony was taken. Various reports seem to have been made by the master afterwards, to which exceptions were taken by the bank, the chief of which was the rejection of its claim as a preferred debt. The case was pending in the Circuit court for the district of West Virginia for nearly ten years after the judgment in May, 1878, when a final decree in the strict and technical sense of the word was entered in accordance with the terms of the decree of May, 1878. On appeal, a review was sought of the judgment of the Circuit court as to matters passed upon at the hearing in May, 1878. This court holds that the granting of the rehearing after the term expired, was without jurisdiction, the only remedy of the bank being an appeal from that judgment. The second, or general trust deed, provided that after paying the amounts due on judgment and vendors liens, the balance should be paid to other creditors ratably, their debts proven before a master, which was done after the decree of May, 1878, and held to be in ex-

ecution of the decree settling the controverted question as to which of the deeds had priority. The opinion of this court is by Mr. Chief Justice FULLER, and on this point he says: "The controversy raised by the pleadings, and to be determined by the court, was whether the property passed under the deed to the plaintiffs or under that to Mathews, and whether the bank was entitled to the property. *

* * * * * So that all those matters [set up in the supplemental answer] were necessarily passed upon by the court, and the decree in terms declared that the facts stated in the amended and supplemental answer did not change the rights of the parties, made the injunction perpetual, and directed the fund to be brought into court for distribution in accordance with the provisions of the deed. * * * This finally determined the entire controversy litigated between the parties, and nothing remained but to carry the decree into execution." Surely we may confidently invoke this decision as an authority clearly in point in the case at bar on two questions: (1) That the decree of June, 1865, was, in the sense in which we deal with it, a final or appealable decree, settling the controverted matter of title. (2) That any attempt to vacate that decree, whether on petition for rehearing or otherwise, after the term at which it was entered, was ineffectual for want of jurisdiction, the only remedy being by appeal. A similar ruling is made by this court in a criminal case (*U. S. vs.*

Pile, 130 U. S. 280.) The defendant was convicted, motion in arrest and for a new trial made and denied, and sentence passed, but its execution was suspended for three months. It was held that suspension of the execution of the judgment without any motion pending for a rehearing did not give the court jurisdiction at a subsequent term of the court to set aside the judgment overruling the motion in arrest. After finally granting the motion in arrest, the judgment was vacated, but it was held that such judgment was without jurisdiction, and void.

Conceding, for the sake of argument, that the June decree was not final in the sense we are considering it, was it less binding upon the parties and the court until properly vacated? Because it was subject to be revoked, was it to be ignored and entitled to no respect as an adjudication until after the conclusion of the whole case, or until the confirmation of the report of the commissioners appointed to execute it? Justice COLLIER does not claim that the September decree vacated that of June, 1865, as an adjudication of appellant's rights, for he says: "It was a mere modification of the prior decree *pro tanto*—that is to say, so far as the adult complainants were interested, it was entirely abrogated, and so far as the infants were affected it dismissed only the partition part of the former decree, even if it did that." (Rec. in No. 91, p. 83.) Whether the learned justice is here treating of what the September decree purported to do, or of its

legal effect by reason of the infancy of these appellants, we know not. If the latter, then he concedes away the entire case of the appellees, and if the former we most respectfully submit that there is nothing in the terms of the extraordinary and sweeping order to justify such a distinction or qualification. If, as we must suppose, the distinction is based upon the fact, that some of the parties affected by the order were *sui juris*, and others were without legal capacity to consent, then confessedly nothing was done by the District court to affect a divestiture of the title of these appellants. We need not argue nor cite authority to this court for the proposition that every judgment by a court of competent jurisdiction, whether interlocutory or final, is binding until annulled or reversed. We do not understand that it is contended in this case that the District court took any action nullifying the decree of June, 1865, unless that of September, 1866 had such effect. While conceding that that decree had no other effect than to dispense with the partition, Justice COLLIER seems, nevertheless, to contend that the decree of June, 1865, established nothing. To use his own language, the only right appellants had under that decree was an interest in "a suit pending, with nothing in it that was *res adjudicata*;" that after, as well as before, their interest in the grant was a mere equity, and in no sense a legal or vested interest. For this reason, it is said, the court had inherent jurisdiction to dispose of the

interest. The character of the estate with which this decree invested the Bent heirs was before the Supreme court of New Mexico in *Bent vs. M. L. G. and Ry. Co.* 3 N. M. 158, before cited in another connection. It is there said: "It has been suggested by counsel for defendants in error in their argument, that the estate vested in these infants was only equitable." After stating the argument in support of this suggestion, the opinion proceeds: "We hardly think this suggestion or argument is worthy of consideration. It is enough to say that the decree of the court in that suit in equity changed what had theretofore been an equitable interest into a substantial and well defined legal interest. It was for that purpose the suit was brought, and its purpose was accomplished and declared by the decree in question. It being a legal estate with which these infants were vested, it was error for the District court of Taos county at that time to make a decree authorizing any person to divest them of that estate." The decree itself was before the court, and that part of it adjudicating and defining the interest to which the Bent heirs were entitled, is copied into the opinion. In immediate connection with what we have quoted from the opinion, the court discuss the question of jurisdiction, and holds, for the reason stated, the court was without jurisdiction to order the sale. We submit that this decision, on both these propositions, became the law of the case both in the District court, which after

wards ignored it, and in the Supreme court itself.

Elliott's App. Pro. sec. 578.

Skillens' Exr. vs. May's Exrs., 6 Cranch
267.

Washington B. Co. vs. Stewart, 3 How.
413.

Sibbold vs. U. S. 12 Pet. 488.

Moore vs. Calkins, 95 Cal. 435.

Heffner vs. Brownell, 75 Ia. 341.

Alexander Sav. Inst. vs. McVey, 84 Va.
47-8.

Thatcher vs. Gottlieb, 59 Fed. Reb. 872.

Gould vs. Sternberg, 128 Ills. 510.

Plymouth Co. Bank vs. Gilman, 3 S. D. 170.

The last case cited holds that the state Supreme court is bound by this rule when the previous decision was made by the territorial Supreme court. The fact that the personnel of the courts of New Mexico was changed between 1884 and 1893 does not, we apprehend, make this rule less binding. The legal effect of this decision, however, is sought to be avoided on the ground that the two questions need not have been decided by the court; in other words, that those portions of the opinion which pass upon these questions were *dicta*. The bill of appellants in that case seeks to enforce the decree of June, 1865, and to vacate the alleged decree of September 1866, because the latter was for several reasons invalid, and given without jurisdiction. The validity of the latter decree was therefore directly

in issue, and the court holds it void for want of jurisdiction of the subject matter. As shown by the quotation from the opinion, counsel for appellees contended that the decree was authorized, because appellants' interest under the June decree was only an equitable claim, and not a legal or vested estate. The ruling made is in direct response to this contention. If these two questions were not before the court on that appeal we do not understand how they were properly subjects for decision on the last appeal. Yet so far as the opinion may be taken as a basis for its judgment, that tribunal did not hesitate, not only to decide both questions, but to decide them differently, from the judgment already given by the same tribunal on the previous appeal. As indicated by this record, L. B. Maxwell, in his lifetime, brought many remarkable things to pass, and the corporation bearing his name may be equally potential; but the principles of law surely do not change at its behest.

But giving the decision referred to no more weight than its reasoning entitles it to, and treating the question as an open one, we submit that the judgment appealed from cannot be sustained on the ground upon which it is thus placed by Justice Collier. Under allegations of the bill filed by Charles Bent's heirs the defendants in the suit held the legal title to the interest claimed as trustees. The prayer of the bill is: "And that this Honorable Court may decree to your petitioners according, to

their respective rights, their said portion or interest in and to the said grant or merced and to their heirs in fee simple." (Rec. p. 107, fol. 193). The decree entered under this bill, upon demurrer and answer denying the trust, proofs and hearing, found that Charles Bent at the time of his death was entitled to a one-fourth interest in the grant, and "that the said undivided one-fourth part in and to said grant of land or real estate be and hereby is declared and established in them, the said Alfred, Estefana and Teresina, and to their heirs and assigns forever, with full and perfect right, power and authority to possess and enjoy the same." (Rec. p. 115, fol. 207). The previous equity was thus transformed into a present legal estate, with the right to enter into possession of it; and it was beyond the power of the court to affect the title by subsequent decree. That the decree accomplished what it purported to do the defendants in that suit, appellees here, ought to be estopped to deny. They secured to be entered in that case in April, 1866, two orders, one substituting these appellants as the heirs-at-law of Alfred Bent and the other appointing their mother their guardian *ad litem*, with power to "carry into execution all sales or transfers made of their interest in the real estate therein described." (Rec. p. 125). The deed, contemplated by the order was prepared by counsel for Maxwell. (Rec. p. 158, fol. 232). The granting words of that deed are: "I do grant, bargain, sell, convey, confirm and transfer unto the said Lucien

B. Maxwell, his heirs and assigns." Following these words is a description of the entire grant, and following that is this *habendum* clause: "To have and to hold one undivided one-twelfth interest of, in and to the above described real estate," with this covenant: "I Guadalupe Bent, guardian *ad litem*, hereby covenant to and with the said Lucien B. Maxwell, his heirs and assigns, that the above described interest hereby conveyed of, in and to the said real estate is free and clear of all encumbrances, and that I, my heirs, executors and administrators, shall and will warrant the title to the same unto the said Lucien B. Maxwell, his heirs and assigns forever, against the lawful claims or demands of all persons whomsoever." In the court below counsel for the Maxwell company had much to say as to the effect of this covenant on the title, both as to Mrs. Bent and her children. Certainly a direction to a guardian or commissioner to convey the interest of minors in real estate does not authorize such person to make covenants for them. If it be her personal covenant it can add nothing to the effect of the deed as a conveyance of the title of the infants. The learned counsel, as well as the court, seem to forget that the grantee under this deed had held the interest described in trust for the grantors; and it illustrates the extent of Maxwell's imposition upon these infants and their mother that he should have exacted of her a conveyance of the interest of his own *cestui que trusts* to himself, with full cove-

nants of warranty. If Maxwell held the title as trustee and denied the trust, surely a decree against him should operate to establish an estate in his *cestui que trusts*. (1 Pom. Eq. secs. 430-1). But whatever be the effect of the covenants in the deed in other respects, we submit that the insistence upon them by Maxwell should estop him to say that the heirs of Bent had no interest or title in the land which was the subject of a conveyance.

It is impliedly admitted by Justice Collier that if the interest of these infants had been a legal estate at the time of the transaction in question, the District court would have been without jurisdiction to dispose of it. And it is therefore held, as contended by counsel, that courts of equity have inherent jurisdiction to direct a sale of equitable interests of infants. To support this contention two adjudications are cited, one by the old Court of Errors of New York and the other by the Commissioner of Appeals of that state. The first (*Cochran vs. Van Surley*, 20 Wend. 365,) was a sale made under authority of a private act of the legislature of New York for the relief of one Clark. This court considered a sale under this act in *Williamson vs. Berry*, 8 How. 591. Referring to *Cochran vs. Van Surley*, and particularly to the opinions of the Chancellor Walworth and Senator Verplank in that case, this court then said: "Our conclusion, however, contrary to theirs, will be put upon grounds not suggested when they acted in those cases. In-

deed our point of difference is not concerning a principle or rule in chancery, but as to the application of the rule in *Cochran vs. Van Surley*. It was said in that case, and it was the foundation of the judgment in it, that the decree in chancery could not be inquired into in a collateral way for the purpose of setting aside rights growing out of it. We concur that neither orders nor decrees in chancery can be reviewed as a whole in a collateral way, but it is an equally well settled rule in jurisprudence that the jurisdiction of any court exercising authority over the subject may be inquired into in every other court when the proceedings of the former are relied upon and brought before the latter by the party claiming the benefit of such proceedings," citing previous decisions of this court. Then the court states the question thus: "The question in *Cochran vs. Van Surley*, and in this case, is whether the chancellor did or did not, in a case in which he had jurisdiction for certain purposes, exceed the jurisdiction given to him for the special purposes of the case. Jurisdiction may be in the court over the cause, but there may be an excess of jurisdiction asserted in its judgment." It is then said that if the decision is to be taken as deciding that the chancellor had authority under the act to order the sale objected to by the infant heirs of Clark (of which some doubt is expressed), it would not be binding upon this court because based upon a private and not upon a general statute. Hence,

Cochran vs. Van Surley is overruled and its authority for the proposition to which Justice Collier cites it is denied. Justice Collier seems not to have observed that the decision cited was rendered under a special statute, conferring upon the father of the minors in that case, the right to apply to the court of chancery for authority to sell his children's interest in the property in question. In that case the father held the legal title in trust for himself and his children. The sale of that interest was held by this court to have been without authority, for the reason that the directions of the legislature were departed from, and the chancellor had no authority in the premises outside of that given by the legislature.

The second authority relied upon for the proposition that a court of chancery has inherent authority to dispose of equitable estates of infants, is *Anderson vs. Mathew*, 44 N. Y. 249 (Com. of Appeals). In that case the land in question had been granted to a trustee to pay the income to the grantor's daughter for life, and then to convey it to her children. After the death of the trustee the daughter and one of her children, of full age, applied to the court of chancery for authority to sell the property and reinvest the proceeds, on the ground that the property was falling into decay and the income was insufficient to do more than to keep the property in repair, leaving nothing for the mother. Two of the children were minors. A sale, after

reference to and report by the master, was ordered and the moneys reinvested in part in other real estate under the directions of the court; and later the property so acquired was partitioned by sale, and the heirs received the proceeds. This was a suit in ejectment by one of the minor heirs to recover her interest in the property originally granted, and it was held that she could not recover, principally because she had ratified the sale by receiving, after her majority, the proceeds of the partition sale. It is also said in the opinion that inasmuch as plaintiff had never had the legal title, her mother having conveyed it to the defendant while she held it, a court of law could take no cognizance of a purely equitable title. But that objection, if good there, is not here; for this is a suit in equity. As to the validity of the original sale, the court in that case says: "One of the powers inherent in the court of chancery is the protection of infants and their estates. The authority to sell the estate of infants of an equitable character independently of any statutory power, has been exercised by the court of chancery in several instances in this state. We are referred to cases fully sustaining our position;" citing *Cochran vs. Van Surley* and *Pitcher vs. Carter*, 4 Sandf. Ch. 1. But it appears that at the time the sales in *Anderson vs. Mathew* and *Pitcher vs. Carter* occurred (in 1835) a general statute had been in force in New York for several years expressly authorizing such sales. (2

Rev. Stat. 1829, sec 170). In *Pitcher vs. Carter*, a mortgage of the interest of infants in real estate, for the purpose of improving the property and rendering it productive, is held void because the chancellor making the order was deceived by the mother and guardian of the infants as to the fact that the buildings had been burned while occupied by responsible tenants for long terms under written leases, which did not exempt them from the payment of rent notwithstanding the destruction of the buildings. A decree of foreclosure was refused; and it was further held that by reason of the mortgagee's knowledge of the facts which were kept from the court, authorizing the mortgage, they could have no recourse in equity against the infants, either under the mortgage or against their property for the improvements put upon it by the money loaned. It will be observed that in that case the basis of the proceeding was the unproductiveness of the property in its unimproved condition, and the necessary improvement of it in order to secure an income for the support of the infants.

So that as to the quoted statement upon which Justice Collier rests the judgment of the territorial Supreme court, it would seem it was a *dictum*, and if treated as a decision, it has been expressly overruled by this court. And as to the case of *Anderson vs. Mathews*, this is largely *dictum*, and is based upon the overruled decision in *Cochran vs. Van Surley*.

Whatever may be the character of the interest,

or whatever view may be taken of the jurisdiction of the court to pass the order of September, 1866, there can be no question, we apprehend, that this bill, in its substance, is to enforce the alleged contract or the order of September based upon it. If something were not needed to supplement that order by declaring its legal effect, or by bringing into it some fact not appearing, this suit was unnecessarily instituted. When the case was here before the opinion, after reversing the judgment in favor of the Maxwell company, made a suggestion that a bill might properly be filed to execute the decree of September, 1866, or determine its effect. Of course, in this suggestion, this court did not assume to state everything which should be made to appear under such a bill, nor to anticipate the issues which might be presented. It may be assumed that the amended bill now before the court was the outgrowth of this suggestion. But it is submitted that before complainants can ask a court of equity to decree that the order of September, 1866, or the supposed contract upon which it was based, divested the title of these infant appellants, they must make at least such showing as is requisite to secure the specific performance of contracts between persons *sui juris*, viz; that the contract or order was or is equitable, just, fair, reasonable and free from fraud or suspicion in obtaining it.

Waterm. Spec. Per. secs. 158, 161, 162,
167, 170.

Patterson vs. Bloomer, 35 Conn. 57.

Swint vs. Carr, 76 Ga. 322.

Kelly vs. Cent. P. R. Co. 74 Cal. 557.

Cathcart vs. Robinson, 5 Pet. 264, 276-9.

M. & M. R. Co. vs. Cresswell, 91 U. S. 643.

In Cathcart vs. Robinson, *supra*, this court, by Chief Justice MARSHALL, say: "The difference between the degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. [Citations]. It is said that the plaintiff must come into court with clean hands, and that the defendant may resist a bill for specific performance by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation, or any unfairness, are enumerated among the causes which will induce the court to refuse its aid. [Citations]. If to any unfairness a great inequality between the price and value be added, a court of chancery will not afford its aid." (P. 276). The alleged contract by these infants, or those claiming to act for them, is confessedly the foundation for the order of court relied on, and in order to its enforcement it is submitted that the Maxwell company should show it possesses the qualities enumerated. We do not understand that judgments are

exempted from this note when they do not appear on their face to be such as in equity ought to be enforced.

Story's Eq. Pl. secs. 430, 641.

Not only is the jurisdiction of the District court of Taos county to make the decree of September, 1866, denied, but its fairness and justice from every point of view is assailed. While the territorial Supreme court in its findings of fact declares "that no fraud, imposition or error has been shown to have entered into the transaction, or to have brought about said compromise decree," this is manifestly a conclusion of law rather than a finding of fact (U. S. vs. Ross, 92 U. S. 281). For the acts and declarations of Maxwell tending to show fraud or imposition on his part are first set out in detail. It is submitted, therefore, that the findings of fact justify the conclusion that the transaction as a whole, preceding and including the decree, was characterized by imposition and bad faith. Fraud, imposition or deceit is in nearly all cases an inference to be drawn from conduct, which, in view of the condition and relation of the parties, is inconsistent with good faith and fairness, and need not be shown by direct proof.

Kerr on Fr. & Mis. pp. 384-5.

Allore vs. Jewell, 94 U. S. 507.

Griffith vs. Godey, 113 U. S. 89.

Brown vs. Pitcairn, 148 Pa. St. 387.

It is found that Maxwell was an unscrupulous, resolute, tyrannical, determined man of large wealth and of such great power and influence that the weak feared to oppose him; that he made threats that unless the Bent heirs accepted what he offered them they would get nothing, and that no one should occupy any part of the grant; that Mrs. Bent was an ignorant, illiterate Mexican woman, unfamiliar with business and ignorant of her duties as guardian *ad litem* of her children, and of the extent or value of the grant, as well as the act of Congress confirming it, and of the particulars of the decree of June, 1865, establishing her children's rights. Maxwell's wealth, influence, power and threats were known to her, and influenced her in what she did in the premises. (Rec. p. 131). It is a fact of significance that, knowing her to be ignorant and subject to such domination and fear as his wealth, power and threats might bring her under, he had her appointed guardian *ad litem* for her children as a means of securing from her the alleged contract of sale. (Rec. p. 125, fol. 226). It also appears by the findings of fact that Maxwell represented to Scheurick, Mrs. Bent's known adviser, that the grant was not so large as it was supposed to be, and that it did not extend into Colorado or beyond Red river, when it did so extend over two hundred thousand acres beyond this limit. (Rec. pp. 121-2). It is true that it is further found that the boundary between Colorado and New

Mexico was not at that time definitely known; but there can be no pretense that the location of Red river was not known. It may be safely assumed that the definite boundary between different states is known to but few people, and there is no finding that the general location was not known to Maxwell beyond which a large part of the grant lay. Whether this was an unintentional misrepresentation is not important; for if a party assumes to know a fact material to a transaction, and states it, and it is relied on, as the finding show this was, he is as fully responsible to the party acting upon the representation as if it were known to be false.

Cabot vs. Christie, 42 Vt. 121.

Sears vs. Canaday, 53 N. Y. 298.

Prewitt vs. Trimble, 92 Ky. 176.

It is found or declared in the findings of fact, it is true, that the means of knowledge of the extent and character of the grant were open to Bent's heirs and to their counsel. But this does not qualify the effect of the misrepresentation, nor modify the other finding that Mrs. Bent was ignorant of the character, extent and value of the grant. Maxwell knew her ignorance and reliance upon him and others to whom he made these representations, and they could only have been made in his own interest and to deceive her. A party should not be permitted to induce another to believe and act on a statement of fact, and then insist that the statement should have been dis-

credited and investigation made into its truth or falsity.

Kerr on Fr. and Mis. pp. 78-80.

Backer vs. Pyne, 130 Ind. 231.

Maxwell had owned the greater part of the grant and occupied it for years, and was better informed as to its character and boundaries and what it contained than any of the Bent heirs were, or could ever become, without great expense.

The only attempt to meet the question as to the necessity or excuse for selling appellant's interest in the grant, is found in the introduction in evidence of the inventory filed by Mrs. Bent, as administratrix of her husband's estate, and debts proven against it. (Rec. pp. 121-3.) It is found as an inference from these records that the personal estate was not sufficient to pay the debts, but it is further found that those who were acquainted with Alfred Bent's affairs testify that he had other property at the time of his death than that inventoried, both personal and real, in New Mexico and in Colorado. (Rec. p. 123, fol. 240.) This report was not filed till more than fifteen months after Alfred Bent's death, and nearly a year after the attempted sale of the interest in question. Within that time the estate may have been largely used or dissipated for aught that appears or is known. There is practically no finding on this question, but the inferences to be drawn from the facts found, are that there was no necessity for the sale of this estate in order to the

support of the children. But if, as a matter of fact, the personal estate in New Mexico was insufficient to educate and maintain the children in May or September, 1866, unless this was made to appear to the court, and the order of sale based upon it, no support to the order could be derived from it, even if the court had jurisdiction, and this is denied. This would be so, independently of the duty of the guardian of the infants to apply the personal property in Colorado to the maintenance of the children, before asking that any interest in lands be sold for that purpose.

While inadequacy of price alone is not usually a ground for cancelling a contract or refusing to enforce it; yet, when taken in connection with other evidence of imposition, deception or hardship, it may be, even between persons *sui juris*. How much more rigidly should the rule be applied in such cases as this?

It seems to be deemed by counsel a pertinent, if not an important fact, in this case, that Scheurick and Hicklin accepted the same rate of compensation for their interest which was contracted to be paid Mrs. Bent for her children's interest. Equal importance is given to the fact, as found, that the heirs of Beaubien and Miranda accepted a like rate of compensation. But we submit that such facts have no legal importance in the case at bar, wherein is involved the interests of minors. Persons *sui juris* might be influenced by many considera-

tions to accept a very small price for their property because of the immediate use they could make of the money to greater advantage in business or speculation. No such use can be made of the money of infants. It can only be loaned out at the usual rate of interest. The consideration which may have influenced others is illustrated by the answer of Miranda, who states that he had before "for a consideration greatly under the value of his original and real interest in and to said grant, sold and transferred by quit-claim deed all his said right, title, and interest, to the said Lucien B. Maxwell." (Rec. p. 108, fol. 195). A very suggestive fact bearing on the question of value is the sale of the grant, about three years after the transactions in question, to the Maxwell company for \$1,350,000. (Exhibit E, to complainants bill, p. 20).

But in cases of this kind it is respectfully submitted it is not enough to show that the price paid, or agreed to be paid, was adequate at the time. The conversion of the real estate of infants into personalty or money is not favored, because of the liability to its loss. Courts of equity in all jurisdictions, whether there is a statute authorizing it or not, set their faces against the unnecessary sale of the interest of infants in lands, as tending to the loss or dissipation of their patrimony. This is emphasized in *Hartman vs. Hartman*, 59 Ill. 103, which was a partition suit instituted on behalf of infants. The Supreme court of that state says: "This proceeding

has been instituted on behalf of the minors. No reason has been shown why partition should be granted. We cannot perceive that it would be for the interest of the minors to grant the division. A decree in their favor would necessarily result in a sale, for the proof shows that there could be no partition. The answer and affidavit of appellee also discloses that his sole object is to obtain the money. We are satisfied that the land is the safest investment. It cannot be squandered as too often happens with the money of infants. It is now worth \$80 per acre—lying in one of the richest and fairest portions of the state—and will probably increase in value. It is permanent, and cannot be lost by dishonesty or carelessness. Valuable coal mines, too, underlie its surface, and their development will probably prove a source of large profit. We cannot consent that this property, now safe from the fluctuations of prices and the accidents of money lending, and the faithlessness of guardians, shall, without any necessity, be changed into a fund which may take wings and fly away. It might prove a grievous wrong to these children, of which we have no ambition to be guilty." This language is a fulfilled prophecy in the case at bar, if this decree shall be affirmed.

The court declines in this case to assume the responsibility of fixing a definite value upon the property at the time of the transaction, and contents itself with the statement that the opinions of wit-

nesses place the value at 2 1-2 cents to \$1.25 per acre. There is nothing even to indicate toward which figures the weight of the testimony gravitated. The price paid did not even approximate a medium between the two extremes, but on the contrary, is only about 4 cents per acre—1 1-2 cents per acre above the minimum which the Maxwell Company could secure a witness to name as the market value of the property. And this for an estate found to contain some of the best and most valuable lands in the territory; embracing a large number of acres of grazing and tillable lands; traversed by several streams, furnishing water for irrigation; a small part of which was cultivated in May, 1866, and, in addition containing large bodies of timber, and known to contain considerable deposits of coal, and then believed, and has since been proven, to contain considerable deposits of precious metals, gold and silver; about 200,000 acres of which lay in the state of Colorado. (Rec. pp. 120-1). Justice Collier is constrained to declare in the opinion filed, that while not disposed to enter into a discussion of the testimony tending to impeach the decree of September, 1866, for fraud in obtaining it, he is not prepared in view of the testimony submitted since the decision in *Thompson vs. Maxwell*, 95 U. S. 400, to say that the proofs show a case which supports the conclusions of the decree to the effect that the terms of the so-called compromise made by the adult parties to the suit, were advantageous to the

said infants. (Rec. in No. 91, p. 85, fol. 143).

It is further found that "it cannot be said from the testimony that there was a market for such grants at the time, in the sense of a demand for them, their value being largely speculative for the future." No more cogent reason could have existed why the estate should not have been sold than that there was no demand or market for such property at the time. The property was unimproved, timbered, grazing and mineral lands, not subject to waste by falling into decay, and not even subject to taxation; the revenues of the territory at the time being derived, it seems, entirely from licenses and personal property. Therefore, time could only increase and not diminish the value of the property, even if the country remained in its then undeveloped condition. But there was every reason to expect growth of population and development. The war had but recently closed and released hundreds of thousands of men from enforced absence from their ordinary industrial pursuits, and had left the entire south under such a desolating blight that its enterprising young men would be almost driven to seek more inviting fields of industry and enterprise. Railroad companies had been incorporated by the United States government and the territory of Kansas, to build roads afterward known as the Union Pacific, Kansas Pacific and Atchison, Topeka & Santa Fe, with land grants to aid them; the latter to build from Atchison on the Missouri

river through this grant to Santa Fe, in New Mexico. The construction of the Union Pacific line had already been begun and the Atchison, Topeka & Santa Fe line was completed through the grant while appellants were yet children. Emigration from the south and the east was thus invited, and came in large numbers into the territory now constituting Nebraska, Kansas and Colorado and into New Mexico. With such prospects as these, and no demand for the property, and no necessity for it, the sale of the interests of these infants in this splendid patrimony, with almost absolute certainty that by the time they should attain their majority, it would be as competent in value as it was then princely and magnificent in extent, was little short of a crime.

It is insisted, however, that the transaction was a "compromise of a doubtful and uncertain claim" on the part of the infants, and as courts favor compromises, Justice Collier thinks this decree should be accepted as a "fair and reasonable exercise of the chancellor's discretion." And this notwithstanding the declaration of the learned justice that he cannot say, in the light of the facts we have just detailed, that the sale was to the advantage of the infants. If it was not to their advantage, and it surely was not, it must have been to their disadvantage, and if to their disadvantage, it matters not what the character of their title was or whether it was a sale or a compromise of a doubtful right, it cannot be sustained or enforced

in this suit against them. But while the bill alleges a compromise and the decree of September, 1866, speaks of a settlement, and the opinion of Justice Collier also speaks of the transaction as a compromise, the court expressly finds that "Scheurick and the other complainants did not consider their claim after the decree of 1865 as being doubtful or uncertain." (Rec. p. 126, fol. 227). That finding is directly responsive to the allegation of the amended bill, and removes every support to the theory that the transaction was a compromise on the part of Bent's heirs of a doubtful claim. A further finding is made, in immediate connection with the other, that one of the reasons influencing the Bent heirs in the transaction, was that the law suit involving the partition of the property might drag along indefinitely, Maxwell having declared to Scheurick that he would "out-law them or put them off from court to court, he having the means to do so, and having some time before told Scheurick that he paid his attorneys one thousand dollars to put the case off for six months." This finding, in connection with Maxwell's power, influence and threats before referred to, suggests the reason the partition had not before been made, and the facility with which he was enabled to bring those who opposed him, in matters of personal concern, to his own terms, whether by contract or court orders.

But this record should estop the Maxwell com-

papy from setting up the claim that the transaction was not intended as a sale of an established and recognized interest in the grant. We have already referred to the character of the orders Maxwell secured to be entered in April, 1866, and of the deed his attorney exacted of the ignorant guardian *ad litem* of these appellants. The company's attitude, in view of the necessities of the case now made, is that the children in fact had no interest in the grant. And yet it is claimed that the consideration paid for the pretended compromise was greater than the property conveyed by the warranty deed of May, 1866, was worth! In compromises both parties are supposed to yield something, but under the contention here made, appellants had nothing to convey, and Maxwell paid them more for what they pretended to have than it was worth, if they had had it. Certainly at the time of the transaction Maxwell did not understand that he was buying his peace of these weak and helpless people, instead of their interest in the grant which had a year before been decreed to them.

But compromise agreements brought about by imposition, misrepresentation, threats and other unfair means are not less tainted and invalid than other contracts. Nor have infants, their guardians, or their attorneys, any greater authority to concede away, release or compromise their rights or even arbitrate them, when in dispute, than to sell and

convey them when uncontroverted.

Tyler Inf. & Cov. p. 55.

Baker vs. Lovett, 6 Mass. 78.

Fridge vs. State, 3 Gill. & Johns. 115.

Swint vs. Carr, 76 Ga. 322.

Pitcher vs. Turin Plank R. Co. 10 Barb.
436.

Kingsbury vs. Buckner, 134 U. S. 650.

In the case last cited this court held that the consent of the guardian *ad litem* of infant defendants to transfer an appeal from one grand division to the Supreme court of the state of Illinois to another, to facilitate an early disposition of it, deprived the infants of no advantage or right whatever, and was therefore not subject to objection. But Mr. Justice HARLAN, who wrote the opinion, declares in this connection: "It is undoubtedly the rule in Illinois, as elsewhere, that the next friend, or guardian *ad litem* cannot by admissions or stipulations surrender the rights of the infant. The court, whose duty it is to protect the interest of infants, should see to it that they are not bargained away by those assuming or appointed to represent them."

In *Baker vs. Lovett*, and *Pitcher vs. Turin Plank R. Co. supra*, compromises had been made and executed by minors, of pending or threatened litigation, and in both cases it is held that, having no capacity to release rights in one case, or to concede a liability in the other when it did not exist, the compromises

not appearing to be for their advantage, should be set aside.

But suppose the interest to have been only a doubtful claim in a doubtful lawsuit, and not a decreed right to an undivided twelfth of the grant, and the compromise of the litigation had been the question dealt with by both parties and the court, was it less the duty of the court as the guardian of the interests of the infants, to inquire as to the value of the subject of compromise? Was it a matter of no consequence that the property claimed was not only worth six thousand dollars, but one hundred thousand dollars? The probability of the successful issue of the suit, if successful issue had not already been reached by the decree of June, 1865, was an important factor in the so-called compromise. Must we presume that the District court of Taos county determined, without petition, motion, or argument, that its judgment given a year before after demurrer, answer, proofs, and arguments, was of such a doubtful character that the interests decreed by it should be treated as the foot-ball of chance with all the chances in favor of Maxwell and the reversal of the decree? Surely we must presume the court had confidence in its own decree thus deliberately given.

We have examined in detail all the grounds, or suggested grounds, upon which the territorial Supreme court bases its judgment. But at the argument in that court other positions were taken by counsel

for appellees, to which no reference is made in the opinion of Mr. Justice Collier, and which we may assume were regarded as untenable. We cannot safely assume, however, that those grounds will not be urged here and that this court will not entertain them.

The Will of Alfred Bent.

One of these contentions was that Alfred Bent's will invested his widow with title to the property in question, and therefore his children and heirs-at-law had no interest at the time steps were taken to acquire the title from them. The first objection to this is that appellees ought not to be heard to make such contention. Not only were appellants substituted as the heirs-at-law of Alfred Bent, in the cause in which the decree of June, 1865, was rendered, at the instance of Maxwell, but both subsequent orders in that case, including the decree of September, 1866, together with the deed taken from their mother, treated them as the inheritors of this estate. Not only that, but the original bill filed in 1870, as well as this amended bill filed in 1880, after the cause was remanded from this court, proceeded against these appellants as the "minor children and heirs" of Alfred Bent. (Rec. p. 67, fol. 117). The order of September, 1866, directs Mrs. Bent as guardian *ad litem* of the "minor heirs of the said Alfred Bent," naming these appellants, to convey "their right, title, interest, claim and de-

mand of and in the lands in controversy in this cause." (Rec. p. 130, fol. 234). It is said in the amended bill "that in the proceedings in said suit it is doubtful whether against the said minor children and heirs of Alfred Bent" it sufficiently appears they have no title, etc. (Rec. p. 69, fol. 121). Mrs. Bent is nowhere referred to, or made a party, otherwise than as administratrix, or guardian *ad litem* of her children. It is found, as a fact in this case, that this will was not produced in evidence until the close of the testimony taken under the Maxwell company's amended bill 1886, (erroneously printed 1866), and after the decision of Thompson vs. Maxwell, 3 N. M. 269, by the Supreme court of the territory. (Rec. p. 124, fol. 224). No excuse is given for not producing it before. But no effect is given by the decision here appealed from to this will. Under the decision made the will could not qualify or modify the effect of the decision reported in 3 N. M. 269, as the law of the case or otherwise. No amendment was offered or made to the amended bill taking any cognizance of this will at all. For these reasons we submit it is entitled to no consideration in determining this appeal. Surely appellees should be bound by some theory or line of attack in this unequal contest. The original bill declared the orders of April and September, 1866, were without authority and invalid. By the amended bill this statement is retracted and those orders are relied on as a basis of title. By both

bills, filed ten years apart, these appellants are proceeded against as the heirs-at-law of Alfred Bent and as the inheritors of this estate. At the conclusion of the testimony this will was presented, and there is another change of front. We submit that at some point in this litigation the doctrine of estoppel should be applied.

But if the will should be held to be properly before this court, then two questions arise under it, viz: (1) Does it vest the legal title to the property in Guadalupe Bent? (2) If it does, is it a valid disposition of the property as against the children of Alfred Bent, under the laws of New Mexico? If either of these questions be determined in favor of Bent's heirs, then the instrument does not affect the decision of any question before the court. The will is brief and the only words which need claim our attention are: "I give and bequeath unto my wife Guadalupe Luz Bent for the maintenance of her and my three children, Charles, William and Silas Bent, all my real and personal property. * * * I desire that my said wife should be my executor, and may join with her if necessary any person who may desire for her benefit and that of my children." (Rec. p. 121). If the will be interpreted as devising the property to the widow, and investing her with the legal title, then it is clearly in contravention of the statute law of the territory, and the children inherit the property from their father as all parties had assumed they did until the instrument was

produced in evidence. By section 10, of chapter 5, of the Revised Statutes of 1865, page 486, it is provided as follows: "Parents and ascendants have a right to disinherit their descendants for the following causes." Then follows an enumeration of eleven different offenses against parents, not one of which these children, by reason of their tender years, were capable of committing; and there is no pretense that they were subject to the penalty of disinheritance.

The most favorable construction for the Maxwell company which this instrument admits of, is that it vests the title of the property in the mother in trust for her children. If it does not, it is void. As such trustee she had no more authority to convey it without direction of a court of competent jurisdiction on proper showing, than if the property had been devised directly to them or had been inherited by them. Wills analogous to this, and some almost precisely similar, have frequently been before the courts for construction in jurisdictions in which there was no restriction or limitation upon the power of alienation, except that the testator should be *compos mentis* and free from duress and undue influence. If in such jurisdiction wills devising property, in substantially the same terms as are here used, are held to vest the right and title in the testator's children, certainly this instrument should be so construed, in view of the statute law of the territory.

When a trust is declared, equity is not favorable to a construction which gives the trustee absolute power or authority to sell, even where he is clothed with a large discretion; and the conversion of realty into personalty, and *vice versa*, will not be allowed except where there is an absolute necessity for it.

Haydell vs. Hersh, 5 Mo. App. 267.

The heir is always favored in law; and while no positive rule can be laid down which shall determine in all cases what terms in a will carry a beneficial interest or create a trust, courts will not be governed by any technical rules, but look to the whole instrument to ascertain the testator's intention, and any language which indicates an intention to stamp upon a devise, the character of a trust, will be sufficient.

Saylor vs. Paine, 31 Md. 158.

We submit that where there are legal limitations or restrictions upon the power of testamentary disposition, the language used in a will must be so interpreted, if possible, as not to contravene the law; and if it does not admit of such construction, the instrument must be held void. So, if Alfred Bent's will must be interpreted as devising his property to his wife, with the power of alienation at her pleasure, it is in conflict with the statute, and void. If, on the other hand, it vests in her the title as trustee for the maintenance and support of his children, it may be sustained; but under either

construction the attempted sale, under the circumstances disclosed in the record, was void. In neither case could it be sold, even under order of court, except for the necessary support of the children, and this brings us back to the proposition already discussed at length. If the children's interest in the property was only what their mother might be disposed and able to give them of the proceeds of a sale, it cannot be said that their father's will gave them any right in his estate at all. If they had no right or title to the property devised, they had none to the proceeds of its sale. Her rights and powers were not essentially greater than they would have been had she been their testamentary guardian, and certainly it would not be contended that she could, in that capacity, make a valid sale of their property. The extent of her authority would be to devote the rents and profits of the estate to their maintenance and education. As a test of the effect of the will, as construed by counsel for appellees, let it be supposed that Mrs. Bent had been the second wife of her husband, and these appellants his children by a former marriage; would the property in question have descended on her death to her heirs or to these complainants? Or if she had made a testamentary disposition of it to others, would her devisees take the property or these appellants? The questions suggest their own answers.

In *Duncomb vs. Holst*, 13 Fed. Rep. 11, it is held by the United States Circuit court, for the district

of Tennessee, that, under a devise to the daughter of the testator "for her and her children's sole and separate use," the daughter had no authority to sell the property, and her conveyance did not give title.

In *Charles vs. Ladd*, 153 Mass. 126, the Supreme court of Massachusetts held that if a testator devise all his property to his wife "to her use and behoof forever," but provides that if any of said property be not expended for her support and maintenance, it shall be disposed of in a particular manner, the will does not vest the property in her absolutely.

In *Ward vs. Peloubet*, 10 N. J. Eq. 394, was presented for construction to the Court of Errors and Appeals of New Jersey, a will whereby the testator gave to his wife all his property "to be disposed of in such manner as she may think proper for the benefit of the family," giving some particular directions as to the education of his children, leaving his wife free to exercise her discretion as to what "donations" she should make on their attaining their majority, but directing that they should be made as "near equal as can be." It was held that the wife took the estate in trust for herself and children, and that she had no right to dispose of it by will.

If the court shall deem this will a factor of any importance in the determination of this case, and its construction doubtful, the position of appellants will be found abundantly sustained by the following

additional authorities:

Markham vs. Guerrant, 4 Leigh, 279.

Hill vs. McRae, 37 Ala. 175.

Johnson vs. Hurley, 3 Tenn. Ch. 258.

Graff vs. Castleman, 5 Rand. 195.

Stillwell vs. Leary, (Ky.) 1 S. W. 590.

Pratt vs. Miller, (Neb.) 37 N. W. 263.

Noe vs. Kern, (Mo.) 6 S. W. 239.

O'Reilly vs. McKiernan, (Ky.) 13 S. W.
360.

Elliott vs. Elliott, (Ind.) 20 N. E. 264-6.

At the hearing below the learned counsel referred to and relied upon the decision of this court, in *Bent vs. Thompson*, 138 U. S. 238, as having some bearing on the effect or construction of this will. We have been unable to discover the grounds for such a contention. Believing the will not to have been executed under such circumstances as to entitle it to be probated and that it was irregularly probated, as a precautionary measure the heirs of Albert Bent applied to the probate court of Taos county for the re-probate of the will; and this court held, confirming the judgment of the territorial Supreme court, that the application was barred by the New Mexico statute of limitations. We find no intimation as to the effect of the instrument as a testamentary disposition of the property in question.

The range and scope of this discussion have been dictated by the counsel for appellee, and the opinion of Justice Collier, rather than by our choice.

In our judgment the consideration of many of these questions is wholly unnecessary to the determination of this appeal. But the importance of the case to our clients is such that we have not deemed it prudent to trust our own judgment as to what is or is not a vital question.

If apology be needed for the length and detail of this discussion, we hope the court may find it in the value of the property involved, the gravity of the questions considered, and in the importance of the issue to our clients.

It is respectfully submitted that the judgment of the Supreme court of New Mexico should be reversed and the bill dismissed.

CALDWELL YEAMAN,

E. T. WELLS,

R. T. McNEAL,

Solicitors for Appellants.



— IN THE —

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

GENERAL NO. 16,110; TERM NO. 91.

CHARLES BENT ET AL.

Complainants and Appellants,

VS.

GUADALUPE MIRANDA.

LUZ B. MAXWELL ET AL.

Defendants and Appellees.

Appeal from the Supreme Court of the Territory of New Mexico.

Statement of the Case.

The issues in this case are in all substantial respects the same as in the case No. 90, except that this is a bill by the defendants in the other suit for the enforcement of that part of the decree of June, 1865, which directs partition of the grant in question, and, if necessary to that end, the vacation of the decree of September, 1866, assuming to set aside the said de-

cree. In this case the complaint sets up as grounds for relief, substantially the same facts and presents the same questions of law, as are relied upon in Charles Bent's separate answer to the Maxwell company's bill. The same facts are found in both cases upon the same evidence, which by stipulation was used in both cases so far as pertinent.

There is no occasion for considering the cases separately in this court. A judgment of reversal in one, would probably, if not necessarily, carry with it a similar judgment in the other.

ASSIGNMENT OF ERRORS.

Though the errors assigned in this record are not, in their substance, different, there are some aspects of this cause which call for a different statement of errors complained of, and we therefore, reproduce here the assignment in full, from pages 89-91 of the record in this cause:

And the said appellants come now and say that in the record and proceedings of the Supreme court of the territory of New Mexico and in the final decree of the said Supreme court manifest error hath intervened in this, to-wit:

I.

The decree of the Supreme court of the territory of New Mexico affirms the decree theretofore

given in the District court, in and for the county of Colfax, in said territory, whereas in the decree of the said District court manifest error intervened, to the prejudice of the said appellants, and decree ought to have been given in the Supreme court of the territory of New Mexico reversing and annulling the decree so given in the District court.

II.

Also in this, towit, that the facts found and declared by the Supreme court of the territory of New Mexico are not sufficient to sustain the decree given in the District court of the county of Colfax aforesaid, nor the decree of affirmation thereof given in the Supreme court of the territory of New Mexico, but, on the contrary thereof, upon the facts found by the said Supreme court of the territory of New Mexico, the decree given in the District court of the said county of Colfax ought to have been reversed, annulled, and in all things held for naught.

III.

Also in this, towit, that in and by the said record and proceedings it doth appear that by a certain final decree made and given in the District court in and for the county of Taos, in the territory of New Mexico, on the 3rd day of June, 1865, Alfred Bent, ancestor of the now plaintiffs and appellants, was vested with one undivided twelfth part and share in the premises named in the bill of complaint of plaintiffs in the District court of the said county of Colfax, and the decree afterwards, at the September term, 1866, given in the said District court in and for the county of Taos, assuming to

vacate, annul and set aside the final decree given on the 3rd day of June, 1865, was and is erroneous and void as against appellants, and decree ought to have been given in the District court in and for the said county of Colfax according to the prayer of the complaint of these plaintiffs in the said District court, whereas in and by the judgment and opinion of the said Supreme court the final decree of June 3, 1865, so given in the District court of the said county of Taos, was declared to be interlocutory, and, further, in and by the judgment, decree and opinion of the Supreme court of the territory of New Mexico it is declared that the said decree entered at the September term, 1866, of the said District court in and for the county of Taos, assuming to vacate, annul and set aside the said former decree of the District court upon the consent merely of parties, not showing or setting forth who assumed to the said court to represent or consent for the now plaintiffs and appellants in that behalf, and no evidence being heard touching the matter, was and is nevertheless effectual to vacate, annul and set aside such former decree in favor of plaintiff's ancestor, the said Alfred Bent.

IV.

It appears by the record and proceedings of the said Supreme court that by a certain former decree and opinion rendered and given in this same suit in the said Supreme court of the territory of New Mexico, it was found, adjudged, decreed and declared that by a decree given in the District court in and for the said county of Taos, on the 3rd day

of June, 1865, as set forth in the bill of complaint of these plaintiffs herein, there was vested in Alfred Bent, ancestor of these plaintiffs, a legal estate in the undivided one-twelfth part in the lands in the said bill of complaint mentioned, and that the decree given in the said District court in and for the said county of Taos, at the September term, A. D. 1866, thereof, assuming and pretending to vacate and set aside such former decree in the said District court, was wholly erroneous and void; nevertheless the said Supreme court of the territory of New Mexico, by the decree and opinion rendered and given herein, at the July term thereof, last past, doth in effect find, declare and adjudge that the decree so given in the District court in and for the said county of Taos, at the September term, 1866, was, effectual to vacate, annul and set aside such prior decree of the said District court in and for the said county of Taos.

Wherefore, for the errors aforesaid and manifold other errors, in the said record of proceedings and in the decree of the said Supreme Court of the territory of New Mexico appearing, the said Charles Bent, Alberto Silas Bent and Juliano Bent pray that the decree of the Supreme court of the territory of New Mexico and the decree given herein in the district court in and for the county of Colfax may be reversed, annulled, and altogether held for naught, and that plaintiffs be restored to all things which by virtue thereof they have lost, and they also pray that decree be given for their costs in this behalf expended.

It is respectfully submitted that for the reasons already urged in our brief in the other case, the judgment in this should be reversed, and complainants and appellants be allowed to proceed with the execution of the decree in their favor by the partition of the property in question and an accounting.

CALDWELL YEAMAN,

E. T. WELLS,

R. T. McNEAL,

Solicitors for Appellants.

J. G. CARLISLE,

of Counsel.

No. 90.

Brief of Carlisle For Appellants.
Supreme Court of the United States.

October Term, 1897.

Filed Oct. 28, 1897.

No. 90.

GUADALOUPE THOMPSON, ADMINISTRATRIX,
ETC., ET AL.,

Appellants,

v/s.

THE MAXWELL LAND GRANT AND RAILWAY
COMPANY ET AL.,

Appellees.

No. 91.

CHARLES BENT ET AL.,

Appellants,

v/s.

GUADALOUPE MIRANDA ET AL.,

Appellees.

BRIEF FOR APPELLANTS.

J. G. CARLISLE,

LOGAN CARLISLE,

For Appellants.



IN THE
Supreme Court of the United States.
OCTOBER TERM, 1897.

GUADALOUPE THOMPSON, ADMINISTRATRIX, ETC., ET AL., <i>Appellants</i> , vs. THE MAXWELL LAND GRANT AND RAILWAY COM- PANY ET AL., <i>Appellees</i> .	}	No. 90.
--	---	---------

CHARLES BENT ET AL., <i>Appellants</i> , vs. GUADALOUPE MIRANDA ET AL., <i>Appellees</i> .	}	No. 91.
--	---	---------

BRIEF FOR APPELLANTS.

By agreement, these two causes were consolidated and heard together, both in the district court and in the supreme court of the Territory of New Mexico, from which these appeals are prosecuted.

The litigation has been pending for a number of years, and the records are somewhat voluminous, but, as the controlling questions in both cases relate to the regularity and validity of the orders or decrees entered by the district court for Taos county, New Mexico, on the 12th day of April, 1866, and the 13th day of September, 1866, in the case of the heirs of

Charles Bent against the heirs of Charles Baubien and others, it would be useless to encumber this brief with a detailed recital of all the pleadings and other matters contained in the records. The orders or decrees referred to will be found on pages 125 and 129, in case No. 90, and on pages 69 and 73, in case No. 91.

Case No. 90 was before this Court on appeal several years ago, and is reported in 95 U. S., 391, to which we refer for its history up to that date. After its return to the court below, an amended bill was filed by the complainants, to cure the defects for which the judgment was reversed here, and additional evidence was introduced and further proceedings had, which resulted in the decree now appealed from. A substantial statement of case No. 91 is contained in the brief of associate counsel, to which, also, we refer the Court.

In 1859, the heirs of Charles Bent filed a bill in the district court sitting in Taos county against Charles Baubien, Lucien B. Maxwell, and others, claiming an undivided one-third of a tract of land supposed to contain about two million acres, commonly known as the Maxwell grant, and praying for a partition between themselves and the other owners. The object of that action was twofold: First, to establish the interest, which was controverted, and, secondly, to have the interest, when established, set apart to the complainants. (Record in 90, pp. 102-107; Record in 91, pp. 46-51.)

Answers were filed, testimony was taken, and the cause was tried on the merits at the June term, 1865, when the following decree was made by the court:

"And now on this day came the parties, by their counsel, and this cause having been at a former term of this court heard upon the bill and amended bill, and the answer thereto, the

supplemental bill and the answer, and the testimony herein on file, as taken in this cause, which cause was taken under advisement by the court as to the decree which should be made in the premises, and the court being fully advised, in consideration thereof, therefore it is ordered, adjudged, and decreed by the court that the said complainants, Alfred Bent, Estefana Hicklin, and Teresina, otherwise Teresa T. Bent, be, and are hereby, declared to be the natural son and daughters of the said Charles Bent in the said bill mentioned, by him begotten upon and conceived and born of Ygnacio Jamarillo, within the Territory of New Mexico, formerly the department or province of New Mexico, and at the time the said Alfred, Estefana, and Teresa were begotten and conceived no lawful impediment existed to prevent the said Charles Bent and Ygnacio Jamarillo from in due form of law solemnizing a contract of marriage, the one with the other; that as such natural children the said Alfred, Estefana, and Teresa, in the absence of any child or heir born in wedlock to the said Charles Bent, became and were at the time of his decease the true and lawful heirs of his body in this Territory, with the full power, right, and authority to inherit, succeed to, and receive the estate, property, rights, and interests of property of the said Charles Bent in the said Territory, and that as such children and heirs they are justly and lawfully entitled to have, maintain, receive, possess, and enjoy all the rights, interest, and estate which in law or equity belonged or pertained to the said Charles Bent at the time of his decease, of, in, or to the lands, real estate, or grant as described and set forth in the complainants' bill and the exhibit therein referred to, which description is as follows, to wit: Commencing below the junction of the Ryado river with the Colorado, thence in a direct line to the east to the first hills, and from thence running parallel with said Colorado river to the north, to a point in front of the junction of the Una de Gato with the said Colorado river; thence following said hills to the east of the said river of the Una de Gato to the summit of the mesa; thence

turning to the northeast along said summit to the summit of the mountain that separates the waters that flow to the east from those that flow to the west, and from thence following the said mountain to the south of the first ceja south of the Ryado river, and from thence following the summit of said ceja east to the place of beginning.

"It is further ordered, adjudged, and decreed that the said Charles Bent at the time of his decease was justly and equitably entitled and seized of one undivided fourth part of the estate in and to the said tract of land, real estate, or grant, and that the said Charles Beaubien and Guadalupe Miranda were at said time so entitled and seized of an equal undivided share of the remaining three-fourths of the said tract or grant.

"Furthermore, that the said Alfred, Estefana, and Teresina (alias Teresa T.), upon the decease of their said father, inherited, succeeded to, and became seized of the said undivided one-fourth part interest and estate which belonged or pertained to the said Charles Bent in law and equity in and to the land or real estate in the entire tract or grant aforesaid at the time of his decease, and that the said Alfred Bent, Estefana, and Teresina are now fully and absolutely entitled to and seized of the undivided one-fourth part of the interest and estate of the said tract of land or grant.

"Furthermore, that the said undivided one-fourth part in and to the said tract or grant of land or real estate be, and hereby is, declared established and confirmed to them, the said Alfred, Estefana, and Teresina (alias Teresa T.), and to their heirs and assigns forever, with the full and perfect right, powers, and authority to possess and enjoy the same."

The decree then prescribed with great particularity the manner in which the partition should be made, named the commissioners and directed them to report, adjudged that the complainants should pay to the defendants Maxwell and the heirs of Baubien, who died pending the suit, the sum of one hundred dollars, being one-fourth of the amount ex-

pended by them in procuring the confirmation of the grant by the Government of the United States, and then it was provided that "the court now reserves and suspends its decree as to the *partition and payment of the costs in this cause* until a future term of the court." In December, 1865, after this decree and after the expiration of the term of the court, Alfred Bent, one of the complainants, was shot and killed, leaving a widow, Guadalupe Bent, and three children, Charles Bent, Julian Bent, and Alberto Silas Bent, all whom were infants of tender years. At the ensuing term of the court, April 9, 1866, the death of Alfred Bent was suggested, and the three infant children were, by an order of the court, made "parties complainant" (Rec. 90, p. 125; Rec. 91, p. 69). At the same time, on the 12th day of April, the following order was made:

"By agreement of the parties, the continuance of this cause, made herein on a former day of this term of this court, is set aside, and on motion of solicitors for complainants, Guadalupe Bent [is] hereby appointed guardian *ad litem* and commissioner in chancery for the minors of Alfred Bent in this cause, with full power to execute deeds or carry into execution all sales or transfers made of their interest in and to the real estate therein described to Lucien B. Maxwell, one of the defendants in said cause, and this cause stands continued until the next term of this court."

Rec. 90, p. 125; Rec. 91, p. 69.

At the next term, September 13, 1866, without any pleadings, exhibits, evidence, or intervening proceedings of any kind, the following order or decree was summarily made and entered upon the records of the court:

"Whereas an interlocutory decree was rendered at a former term of this court in the above cause, decreeing one-fourth

of the land mentioned in the petition herein to the complainants in this cause and appointing commissioners to divide and set apart the portion so decreed; and whereas said interlocutory decree was never carried into effect; and whereas since the time of the rendition of said decree a mutual agreement has been made between the parties to this cause, settling and determining all the equities in the same:

"It is therefore hereby ordered, adjudged, and decreed, by the mutual consent and agreement of the said complainants as well as of the said defendants in this cause, that the interlocutory decree above mentioned, together with all orders made under and by virtue of the same, be set aside; and by the mutual consent and agreement of the said parties it is hereby further ordered, adjudged, and decreed that the said Lucien B. Maxwell, one of the defendants in this cause, pay to the said complainants the sum of eighteen thousand dollars, to be divided among them *per stirpes*—that is, to the said Aloys Scheurick and Teresina Bent, his wife, one-third part, and to Alexander Hicklin and Estefana Bent, his wife, another third part, and to Charles Bent, Julian Bent, and Alberto Silas Bent, the children and heirs of Alfred Bent, deceased, the remaining third part, to be equally divided among the said last named and to be paid into the hands of Guadalupe Bent, widow of the [said] Alfred Bent, deceased, and guardian *ad litem* for said children, for the purposes of the said division.

"And upon the further consent and agreement of the said parties it is hereby further ordered, adjudged, and decreed that the said Alexander Hicklin and Estefana Bent, his wife; the said Aloys Scheurick and Teresina Bent, his wife, and the said Guadalupe Bent, guardian *ad litem* for Charles Bent, Julian Bent, and Alberto Silas Bent, children and minor heirs of the said Alfred Bent, deceased, *within ten days from the day of the date of this decree*, make, execute, and deliver to the said Lucien B. Maxwell good and sufficient deeds of

conveyance of all their right, title, interest, estate, claim, and demand of, in, and to the lands in controversy in this cause: the said Guadalupe Bent, guardian *ad litem* as aforesaid, in the name of Charles Bent, Julian Bent, and Alberto Silas Bent, minor heirs as aforesaid, and the said Alexander Hicklin and Estefana Bent, his wife, and the said Aloys Scheurick and Teresina Bent, his wife, in their own names: and by further consent and agreement between the said parties it is hereby further ordered, adjudged, and decreed that the costs of this suit shall be paid, each of the said parties to pay the separate costs in the same made by themselves."

Before this last order or decree was made, on the 3d day of May, 1866, Guadalupe Bent, as guardian *ad litem*, had, in consideration of \$6,000, which was stated to have been paid in hand, executed and delivered to Maxwell a deed purporting to convey the title to "the entire interest, estate, claim, and demand of the said Charles Bent, Julian Bent, and Alberto Silas Bent, said minor heirs of their father, said Alfred Bent, deceased, of, in, and to the real estate," etc., etc. No other deed was ever made by the guardian *ad litem* or by any commissioner or by any of the heirs of Alfred Bent for the land or for any interest in it, and, as the Court will see hereafter, they have never received any part of the purchase-money.

It did not appear at the time these proceedings took place that Alfred Bent had made a will, although it was a fact that he had made one, which had been admitted to probate in Taos county, where the suit was pending, on the 12th day of April, 1866. The existence of this will was not disclosed in either of the cases now pending in this Court until many

years after they had been instituted. It was introduced in the cases just before the final hearings, and is as follows :

"I Alfred Bent, being of sound mind and memory, and knowing the uncertainty of life and the certainty of death do hereby devise and decree as my last will and testament, in the presence of the subscribing witnesses, as follows to wit: first, I give and bequeath unto my wife Guadalupe Long Bent; for the maintenance of her and my three children Charles, William and Silas Bent, all of my real and personal property—money goods and effects after my just debts have been paid which are as follows to wit—to North and Scott of St. Louis the sum of five hundred and sixty-nine dollars with interest; to Mrs. S. Beuthner and L. B. Maxwell sixty dollars—to David Webster the sum of four dollars; which debts I desire shall be paid. I desire that my said wife shall be my executor and may join with her if necessary any person who may desire for her benefit and that of my children heirs as aforesaid.

"In testimony whereof I have this 9th day of December, A. D. 1865, subscribed my name in the presence of subscribing witnesses."

Rec. 90, p. 121; Rec. 91, p. 65.

In case No. 90, the complainants in the court below—appellees here—sought to have the trust in favor of the heirs of Alfred Bent determined and declared extinguished, upon the ground that the conveyance of the guardian *ad litem* and the proceedings of the Court hereinbefore recited invested Maxwell with their entire interest, while, in case No. 91, the complainants sought to have the same proceedings reviewed and reversed and the conveyance set aside and the original decree of 1865 executed. The district court granted the relief prayed for in the first case and dismissed

the bill in the second one, and its judgments were affirmed by the supreme court of the Territory.

Omitting the recitals of legal proceedings, the court below found and certified the following facts, as required by the act of Congress :

" The said will and foregoing record of proceedings in the probate court of Taos county, New Mexico, were not introduced in evidence in the present litigation until at the close of the testimony taken under the Maxwell Company's amended bill and the Bent heirs' bill, in 1866, and after the case of *Thompson vs. Maxwell*, 3 N. M., 269, had been decided by the supreme court of New Mexico and remanded to the district court.

" Beaubien had left six children. Maxwell married one of them, and purchased the interest of the other five for a consideration of not more than \$3,500 each, at the following dates : Juana and her husband, Joseph Clouthier, and Isadora and her husband, Frederick Muller, April 4th, 1864 ; Eleanora and her husband, Vidal Trujillo, July 20th, 1864 ; Petra and her husband, Jesus G. Abreu, February 1st, 1867 ; Paul Beaubien, January 1st, 1870. Muller and Clouthier were merchants, residing at Taos ; Trujillo and Abreu were farmers, stock-raisers, and also had stores ; all four of them, as well as Scheurich and Hicklin, the husbands of Alfred Bent's two sisters, were intelligent men, ranked among the best citizens in their community, and were considered men of wealth and influence.

* * * * *

" In the meantime the negotiations for compromise, which had been interrupted by the death of Alfred Bent, were resumed, the Bent heirs being now represented by Aloys Scheurich, husband of Teresina, one of the adult complainants, who acted in said negotiations on behalf of his wife, Estefana, and her husband, Hicklin, and Guadalupe Bent. A settlement with Maxwell was concluded by Aloys Scheurich, acting for his wife, Mrs. Hicklin, and her husband, and Guadalupe

Bent as guardian *ad litem* for Alfred's children, which was acceptable to said parties, by which Maxwell was to pay the sum of \$18,000 for the conveyance of the interest or claim of the Bent heirs. The compromise was advised by Merrill Ashurst, the leading counsel for the Bent heirs, the grounds of his advice not being stated. It was accepted and carried out by the adult complainants Teresina and Estefana and their husbands, Sheurich and Hicklin. Sheurich and the other complainants did not consider their claim after the decree of 1865 as being doubtful or uncertain, but made a settlement, one of the reasons therefor being the consideration that the lawsuit involving their interests might drag on a long time, and that they were doubtful when the end would be reached. Maxwell having said to Sheurich that he would outlaw them or put them off from court to court, he having means to do so, and having some time before told Sheurich that he paid his attorney \$1,000 to put the case off for six months.

"On May 3d, 1866, in pursuance of said compromise, Guadalupe Bent, *née* Long, executed a deed to Maxwell for the stated consideration of \$6,000.

* * * * *

"No other conveyance was made by Guadalupe Bent, the said conveyance having been prepared by counsel for Maxwell after one dictated by counsel for the Beaubien heirs.

"The same day Teresina Sheurich, *née* Bent, daughter of Charles Bent and sister of Alfred Bent, executed to Maxwell a like conveyance, conveying a like interest for the recited consideration of \$6,000, with like covenants; and afterwards, on May 31st, 1866, Estefana Hicklin, also a sister of Alfred Bent and daughter of Charles Bent, joined by her husband, Alexander Hicklin, executed to Maxwell a like conveyance of a like interest for a recited consideration of \$6,000, with like covenants."

Here follows the consent decree of September, 1865.

" The said decree was not made by the personal procurement, knowledge, or consent of said Scheurich or Guadalupe Bent, and the fact of the entry thereof was unknown to them for several years thereafter.

" No other pleadings, orders, or proceedings in said cause, other than those above mentioned or recited, appear in the record thereof, and the record thereof does not show whether or not any inquiry was made by the court or by its authority touching the value of the said premises, or of the interest of the now plaintiffs therein, or as to the necessity of disposing of the same, or touching the other estate or means of the said infants, or the ability of the mother of said infants to maintain and educate the said infants, or touching the propriety, necessity, or advisability of such sale and conveyance of the interest of the now plaintiffs, nor does there appear of record any motion, petition, or showing against the propriety of the original decree vacated by the said decree of September, 1866.

" The grant in question contains about one million seven hundred thousand acres, about two hundred thousand acres of which lie in the State of Colorado and the balance in New Mexico, and contains some of the best and most valuable lands in the Territory; it contains large areas of grazing and tillable land, and is traversed by several streams, furnishing water for irrigation, a small part of which was cultivated in May, 1866, and it contains, in addition, large bodies of timber, and in May, 1866, was known to contain considerable coal deposits, and was then believed and has since proven to have considerable deposits of precious metals, including gold and silver. At and about the year 1866 and for several years thereafter there was no demand for or sales of undivided interests in lands of the quantity, character, and location of those in question, such as to create any ascertainable market value thereof. Statements of the value of said land, in the opinion of the witnesses examined in the present suit, based upon a valuation per acre, are given in

the testimony, varying from two and one-half cents to one dollar and twenty-five cents, and it is impossible from these statements to satisfactorily ascertain or fix what was the value per acre of said grant in or about 1866. It cannot be said from the testimony that there was a market for such grants at the time in the sense of a demand for them, their value being largely speculative for the future.

"It is proven on the part of the complainants that the said Guadalupe Bent is a Mexican woman, and at the time of her said appointment as guardian *ad litem* to the infant complainants and at the time of the execution of her deed of May 3d, 1866, was ignorant of the English language, unable to read, write, or speak the same; was unfamiliar with business or with her duties as guardian *ad litem*; was without knowledge of the boundaries or extent of said lands, or the character or value thereof, or of the act of Congress confirming the said grant, or of the particulars of the decree of June 3d, 1865; that Maxwell represented to Scheurich that the grant was not as large as it was supposed to be; that it did not extend into Colorado or beyond the Red river, whereas it did so extend over 200,000 acres; that said Scheurich and Guadalupe Bent believed and were influenced by said representations; that the said Maxwell, while generous and magnanimous in many respects, was unscrupulous and tyrannical as well, and was a resolute and determined man, and was at that time a man of large wealth and great power and influence throughout the county of Taos and Territory of New Mexico, as was known to said Guadalupe Bent, and he exercised such power and influence in such way that the weak feared to oppose him in matters of personal concern; that said Guadalupe Bent was in part influenced in executing said conveyance by this known character of Maxwell; that Maxwell made threats that unless the Bent heirs accepted the sum of \$18,000 for their claims they would never get anything, and that no one should occupy any part of his land, and that such threats were communicated to said Guadalupe, and that this and

Maxwell's known character influenced her in making the conveyance to Maxwell; that the said conveyance was written in the English language and was not read over to said Guadalupe or interpreted to her, but it appears to be the fact that means of knowledge of the extent, character, and value of the said grant was open to the Bent heirs and to their counsel. It was not definitely known at the time where the boundary line between Colorado and New Mexico was. Guadalupe Bent acted in concert with the adult complainants in the suit, dealing with their own interests on the same terms as those she represented, and she was willing to make the same settlement they did. Both Scheurich and the counsel for the Bent heirs were conversant with both the English and Spanish languages and could read and write the same.

"It appears by Guadalupe Bent's own testimony, and the court accordingly finds, that when she executed the conveyance to Maxwell she understood there had been a settlement with Maxwell by which the interests of the Bent heirs were to be transferred to Maxwell for the sum of \$18,000; that she understood the document she signed was a transfer of the interest in the Maxwell grant, which had belonged to her husband, Alfred Bent; that the settlement for \$18,000 was satisfactory to her; that she supposed the document she signed was one which Scheurich had arranged with Maxwell; that she had relied on said Scheurich for advice, and was willing to accept and do whatever he thought best in the matter; that she believed she had authority to sign the deed and to convey the interest in said grant which her former husband, Alfred Bent, had claimed or owned, and it was her intention by the said deed to convey to Maxwell whatever interest in said grant had belonged to said Alfred Bent in his lifetime and was left by him at his decease, and the court finds that no fraud, imposition, or error has been shown to have entered into said transaction or to have brought about said compromise decree.

"No money was received by Guadalupe Bent from Max-

well at the time of the execution of said conveyance. Maxwell, upon the execution of the deeds by her and the two sisters of Alfred Bent, gave to them his three promissory notes, payable in one year, amounting in all to \$18,000, divided into such sums as were desired by the said parties. Guadalupe Bent received one of these notes for something over \$5,000. As to the payment of this note the testimony is conflicting. Guadalupe Thompson testifies that it was paid to her second husband, George W. Thompson, because her husband told her so, to whom she was married about thirteen months after the death of her husband, and to whom she delivered said note, with everything else she had, when she married him and whom she authorized to collect said note. George W. Thompson and other witnesses testify that only a portion of said note was paid. The note is not produced, but its absence is accounted for by the statement of Thompson that he sent it to Maxwell at his request, to have a credit endorsed, and that he never got it back. It does not appear that Maxwell refused to return it. The weight of the evidence is found to be that at the beginning of the Maxwell Company suit a considerable sum, but how much cannot be ascertained, remained unpaid on the note. It also appears that Maxwell was at all times after the making of the note a man of ample financial responsibility. It does not appear that any part of the proceeds of said note was paid to the children of Alfred Bent or their mother, but George W. Thompson supported, maintained, and educated them during their minority, after his marriage to their mother, with the funds of his wife and himself, the same as his own children, keeping no separate account.

" Upon the execution and delivery of the deeds by Guadalupe Bent, guardian *ad litem*, and the adult complainants, May 3d, 1866, Aloys Scheurich and his wife assumed for complainants in said original suit payment of the fees of their counsel therein and paid the same, the amount thereof being included in the note of Maxwell given to Scheurich's wife

and the *pro rata* amount thereof being deducted from the other two notes given to Guadalupe Bent and Mrs. Hicklin in equal proportions. There is no evidence that such counsel or other counsel were afterwards retained by Scheurich or other of said complainants, and the record of the said decree of September, 1866, does not disclose what attorney appeared or assumed to appear for the complainants in said cause and consented to the making of said order.

"The inventory of the property left by Alfred Bent and filed March 6, 1867, by Guadalupe Bent, as administratrix, in the probate court shows that outside of the real estate and the note received from Maxwell the total assets of the estate were \$1,408. The debts mentioned in the will of Alfred Bent, together with additional claims against the estate admitted and allowed in the probate court, amounted to \$2,423; but witnesses familiar with said Bent's affairs testify that at the time of his death he had both real and personal property, other than that inventoried, both in New Mexico and in Colorado.

"And the court makes and certifies the foregoing statement and findings as the facts proven and established by the evidence in each of said causes, and orders that the same be incorporated in the record as part thereof."

On behalf of the appellants we shall insist :

1. That the order of the court appointing a guardian *ad litem* for the infant complainants in the actions was wholly without authority of law, and neither conferred upon the person so appointed any power, nor imposed any duty, in respect to the persons or property of the wards.

2. That, even if the order was regular and valid, the guardian *ad litem* had no power to compromise the litigation or convey the interests of the infants in the real estate in controversy.

3. That the guardian *ad litem*, even if properly appointed, had no power to consent, and did not consent, to a decree for the sale or conveyance of the infants' interests in the real estate, and that the decree of 1865, so far as it adjudged the right of Alfred Bent to an undivided interest in the land, was not merely interlocutory, but was final and conclusive until reversed, and, consequently, the court had no power to set it aside.

4. That the court could not legally, either with or without setting aside the decree of 1865, authorize or direct a sale of the infants' interest in real estate, or validate a void sale of such interest.

I.

The ancestor of the infants was one of the complainants in the suit, and, after his death, the infants were, by an order of the court, without pleading, made parties complainant. The court had no power to select a guardian *ad litem* to prosecute a suit for them. The sole duty of such a guardian, except when otherwise provided by statute, is to defend in an action brought against the infant, and his duties and responsibilities cease absolutely when the litigation terminates. In the absence of statutory provision on the subject, an action in behalf of an infant who has no regularly appointed guardian of his person or estate must be prosecuted by a *prochein ami* selected by the infant himself or by those having an interest in the protection of his rights. In a few of the States the courts are authorized by statute to appoint guardians *ad litem* for infant plaintiffs, but there was no such law in New Mexico. (See 9 Am. and Eng. Enc. of Law, 90, and authorities there cited.)

By the appointment of the guardian *ad litem* and the subsequent proceedings in the court, the infants in this case were placed in the attitude of defendants, but no process was served upon them nor any answer filed for them. From the moment they were made nominal parties on the record, the original purpose of the action appears to have been abandoned, and it became a proceeding to sell and convey their interest in the real estate. The whole case clearly shows that the purpose to use the proceedings to divest the infants of their interest in the land which had been adjudged to their deceased father existed at the time the guardian *ad litem* was appointed, and this is the only reason that can be found for making such an appointment; but they still remained complainants on the record and could not be legally represented by a guardian *ad litem*, even for the original purpose of the action, and, most certainly, not for the purpose of disposing of their interest in the subject-matter of the suit, by either a compromise or a sale.

II.

Assuming that the appointment of the guardian *ad litem* was regular and valid, notwithstanding the infants were not defendants, it seems scarcely necessary to argue that she did not acquire, by virtue of the appointment, any authority or control over either the persons or property of the infants. Such a guardian does not stand *in loco parentis* to the infant. The only interest committed to the care of such a guardian is the interest of the infant *as a litigant* in the particular action in which the appointment is made, and even that interest remains under the protection of the court as well as

the guardian. No authority can be found recognizing the right of a guardian *ad litem* to compromise the substantial rights of the infant, or to sell his interest, or divest him of it by any process or proceeding, direct or indirect, either in or out of court: and yet it appears to have been contended in these cases that the alleged agreement or consent of an illiterate and ignorant guardian—who was, in fact, as incompetent as the infants themselves—imparted validity to a decree which, otherwise, has no semblance of legal support in the record.

At the beginning of this litigation, and for a long time afterwards, it was claimed by the appellees that they had compromised with or purchased the interest of Alfred Bent in his lifetime, and this was, in fact, one of the most substantial grounds upon which they originally based their case; but this allegation was afterwards withdrawn from their pleading (Rec. 90, p. 63), and the court below also found that it was not true (*ibid.*, 125). The claim of the appellees, therefore, so far as it depends upon a compromise or purchase, rests entirely upon the alleged agreement with the guardian *ad litem* and the conveyance made by her on the 3d day of May, 1866, which, it may be remarked here, was several months before the decree or order purporting to authorize a sale and direct a conveyance. But it is insisted that, although the guardian *ad litem* might have no authority, in virtue of her office, to compromise the suit or convey the interest of the infants in the land, she could, in virtue of her office, accomplish precisely the same thing by giving her consent to a decree. The court below, however, by a singular inversion of the propositions made by counsel, confined its discussion upon this part of the cases to the ques-

tion whether the alleged consent *vitiates* the decree or order; not whether it supported or justified the action of the inferior court in directing a sale. Of course, we do not contend that the consent of a guardian *ad litem*, or anybody else, would vitiate a decree which would be valid without such consent, but we do maintain that, where there is, as in this case, nothing whatever in the record to support the decree except the alleged consent of the guardian, the infants are not concluded by it.

On this point the elementary writers are so explicit and the decisions of the courts are so numerous and uniform that it will not be necessary to do more than cite a few of them in order to sustain our position. (See Am. Law of Guardianship, Woerner, 47 *et passim*; 9 Am. and Eng. Enc. of Law, 90, 153, and authorities cited.) Neither the guardian nor the infant can waive the service of process, much less consent to a final decree disposing of the infant's interest in the suit. (Pugh *vs.* Pugh, 9 Ind., 132; Whitesides *vs.* Barker, 24 S. C., 373; McClosky *vs.* Sweeney, 66 Cal., 53; Kansas City *vs.* Campbell, 62 Mo., 588; Wheeler *vs.* Ahrenbeck, 54 Tex., 535; 9 Am. and Eng. Enc. of Law, 155, and numerous authorities there cited.) Neither a guardian *ad litem* nor next friend can surrender any substantial right of the infant by stipulation (Bennett *vs.* Bradford, 132 Ill., 269; Walker *vs.* Grogan, 86 Va., 337; Crothy *vs.* Eagle, 35 W. Va., 143; Bearinger *vs.* Pelton, 78 Mich., 109; Tucker *vs.* Bean, 65 Me., 352; Cartwright *vs.* Wise, 14 Ill., 417; Peck *vs.* Adsit, 98 Mich., 639); nor can a guardian *ad litem* withdraw a plea and allow judgment to be taken (Peck *vs.* Prince, 21 Ill., 164; Lloyd *vs.* Kirkwood, 112 Ill., 329; Carneal *vs.* Streshley, 1 Marsh. (Ky.), 471). He has no power to make a settlement

of the matter in controversy (*Edsall vs. Vandemark*, 39 Barb., 589), nor submit the case to arbitration (*Fort vs. Battle*, 13 S. & M. (Miss.), 133); nor can he agree that one suit shall abide the result in another, although the cases are identical (*McClure vs. Farthing*, 51 Mo., 109). He cannot execute a valid release discharging the interest of a witness, in order to make his testimony admissible (*Walker vs. Ferrien*, 4 Vt., 523); and this Court has held that an infant is not bound by admissions contained in the answer filed by his guardian *ad litem* (*Bank of U. S. vs. Ritchie*, 33 U. S., 128; see also *Kingsbury vs. Buckner*, 134 U. S., 654; *White vs. Miller*, 158 U. S., 128). In the case last cited this Court said:

"In *Wright vs. Miller*, 1 Sandf. Ch., 109, it was held that the answer of an infant defendant by his guardian *ad litem* is not binding upon him, and no decree can be made on its admission of facts. Where relief is sought against infants, the facts upon which it is founded must be proved: they cannot be taken by admission, and *Wrottsley vs. Bandish*, 3 P. Wms., 236, was cited to the same effect. Where there are infant defendants and it is necessary, in order to entitle the complainant to the relief he prays, that certain facts should be before the court, such facts, although they might be the subject of admission on the part of the adults, must be proved against the infants (1 Daniel's C. P., 238; *Mills vs. Dennis*, 3 John. Ch., p. 367). This record discloses that no proof whatever was adduced to sustain the allegations of the second bill. The admissions of the answers were solely relied on."

The decree complained of in the bill of review was set aside, this Court holding, in addition to the other grounds stated, that the court below should have given the infants the benefit of the statute of limitations, although the statute was not pleaded.

All the authorities agree that it is the duty of the court, in cases where infants are parties, even if there is a statute conferring jurisdiction, to see that the guardian *ad litem*, or other person representing them, protects their interests by making a proper defense or by properly prosecuting the action, as the case may be, and that, if he fails or refuses to do so, the court should remove him and appoint some one who will not neglect the trust reposed in him. If a court discovers that a person appointed to protect the interests of infant litigants is neglecting that duty, and, especially, if it discovers that he is engaged in an attempt to compromise the matters in dispute or to sell the property in controversy to the infant's adversary in the suit, it should take prompt and effective action to arrest the unauthorized proceeding, in order that the legal rights of the infant may be properly asserted; but no such action was taken in this case. On the contrary, the court assumed, without any legal evidence of the fact, that the guardian *ad litem* had made a settlement with the infants' adversary, and then it assumed, as matter of law, that she had power to do so; whereupon a decree or order was made, which shows upon its face that it is based upon nothing whatever except the supposed consent. No fact is recited in either of the decrees or orders, or shown by the record, to support the action of the court, except the alleged consent.

The order of April 12, 1866, which is the only one made before the execution of the conveyance, expressly states that it is entered "by agreement of the parties," and the decree or order of September 13, 1866, also, expressly recites that it is entered "by the mutual consent and agreement of the said complainants as well as of the said defendants in this cause." The decree complained of does not state who gave or at-

tempted to give this consent for the infant defendants, and there is nothing in the record from which this information can be obtained. The supreme court of the Territory, however, in its findings of fact, states: "The said decree was not made by the personal procurement, knowledge, or consent of said Scheurich or Guadalupe Bent, and the fact of the entry thereof *was unknown to them for several years thereafter*" (Rec. 90, p. 130; Rec. 91, p. 74). The court does not find that the guardian *ad litem* was present, or that the infants were represented by anybody when the consent decree was made, but it does find and certify a fact which conduces strongly, if not conclusively, to show that they did not even have counsel employed at that time. That fact is, that on the 3d day of May, 1866, more than four months before the consent decree, the attorneys who had, up to that date, represented the adult complainants were paid their fees (Rec. 90, p. 133; Rec. 91, p. 77). The court also finds and certifies that "there is no evidence that such counsel, or other counsel, were afterwards retained by Scheurich or other of said complainants, and the record of the said decree of September, 1866, does not disclose what attorney appeared or assumed to appear for the complainants in said cause and consented to the making of said order." (Rec. 90, p. 133; Rec. 91, p. 77.)

The finding of the court is, therefore, substantially, that no consent was, in fact, given by the guardian *ad litem*, and there is no evidence to the contrary, even if such evidence could be considered on these appeals, except the general statement in the decree complained of, that it was made by the consent and agreement of the parties, which, in the absence of other explanation, always means the parties who were *sui juris*, and, therefore, legally capable of making the

agreement or consent. In the case of *White vs. Miller, supra*, in which the words, "I agree to the foregoing decree," were written at the foot of the decree and signed by the "solicitor for the defendants," some of whom were adults and others infants, represented by a guardian *ad litem*, this Court said: "But it is by no means a necessary inference from this writing that Mr. Morris either was or represented himself to be solicitor for the infants. The record shows that when the previous order of May 24, 1882, was made granting leave to file the supplemental bill, Messrs. Merriek and Morris appeared as solicitors for the adult defendants and consented to the filing of such bill. But it cannot be claimed that they thereby represented themselves to be entitled to represent the infants, because the bill itself shows that the infants were unrepresented, and prayed that a guardian *ad litem* should be appointed. The appointment of the guardian was subsequently made on July 5, 1882, when first the infants were in court. If the infant defendants are to be estopped by the consent of a solicitor, as against their submission of their rights to the protection of the court, the fact that they were actually represented by a solicitor should be made to appear either by a formal entry appearing of record or by evidence showing such fact. * * * Nor can it be safely implied, from the fact that Mr. Morris styled himself solicitor for the defendants and appeared before the auditor as such, that he had been employed to act as solicitor for the infants. Such conduct was entirely consistent with the admitted fact that he was authorized to appear for the adult defendants" (p. 149).

We think it entirely safe to say that no consent was, in fact, ever given for the entry of either of said orders or decrees, by the guardian *ad litem*, or by the infants, or by any

one authorized to act for them, and that the court proceeded in the matter solely at the request and upon the representations of Maxwell's attorneys; and, if this is true, the question of fraud or imposition in procuring the orders or decrees is wholly immaterial.

III.

If we are correct in the foregoing contention, the order or decree of the district court for Taos county, setting aside the decree of 1865, can derive no support from the alleged consent of the infants or their guardian *ad litem*, but must be sustained, if sustained at all, upon the sole ground that the vacated decree was interlocutory only, and, therefore, subject to the control of the court that made it. This is the view of the case taken by the supreme court of the Territory, as shown by the opinion delivered (Rec. 91, pp. 81-86). The alleged consent order of April 12, 1866, by which Guadalupe Bent was appointed guardian *ad litem* for the infants and commissioner in chancery, "with full power to execute deeds or carry into execution all sales or transfers made of their interest in and to the real estate *therein described* to Lucien B. Maxwell, one of the defendants in said cause," requires very little notice in this discussion. It was evidently made at the instigation of Maxwell, and its purpose was to carry out, if possible, the compromise or contract of purchase which he, at that time, and for a long time afterwards, was falsely asserting he had made with Alfred Bent in his lifetime. Mrs. Bent never qualified as commissioner, or attempted to act as such, and the very fact that this uninformed and inexperienced woman, who was confessedly incompetent to manage her own ordinary affairs, was appointed an officer of the

court is, of itself, sufficient to arouse suspicion as to the good faith of the transaction; but, whatever may have been the real purpose of the court in making the order or the intentions of the parties by whom it was procured, it was null and void, because the court had no jurisdiction to order or to authorize a guardian *ad litem* or a commissioner to convey the interests of the infants in the real estate which had been adjudged to them by a decree still in full force; for it is to be borne in mind that the decree of 1865 had not yet been set aside. The parties themselves appear to have concluded that the order of April, 1866, was nugatory, and consequently, at the next term of the court, September, 1866, they secured the order or decree setting aside the decree of 1865 and "all orders made under and by virtue of the same," and substituting an entirely new decree in the cause. (See *Thompson et al. vs. Maxwell Land Grant and R'y Co.*, 95 U. S., 481.)

We insist that the decree of the district court for Taos county, rendered June 3, 1865, adjudging that the complainants in that case were the lawful heirs of Charles Bent, deceased; that said Bent was at the time of his death entitled and seized of one undivided fourth part of the land in controversy; that the complainants, at the death of their father, became seized of said undivided one-fourth interest and were "fully and absolutely entitled to and seized of" the same, and that the said interest "is hereby declared established and confirmed to them, the said Alfred, Estefana, and Teresina (alias Teresa T.), and to their heirs and assigns forever," was a final decree, even under the statutes authorizing writs of error or appeals, and that it was absolutely final and conclusive in the sense that it could not be set

aside or altered by the court after the expiration of the term, except upon proper proceedings for a rehearing or upon a bill of review. The essential matter in controversy in that action was the establishment of the interest of the complainants in the land, and this was, in fact, as will be seen from the pleadings, the only matter about which there was, or could be, any litigation. The right being established by the decree, a partition, if prayed for, followed as a matter of course. It is in such a case merely the execution of the decree. The action might have been maintained solely for the purpose of establishing the right of the complainants to an interest in the property, and, if established, a suit for partition could have been brought afterwards, or, if the right was established and a partition never made, the parties would own and hold the land in common. In other words, the establishment of the right by a court of competent jurisdiction would be just as conclusive without a partition as with it. In a suit for partition merely, in which there is no controversy concerning the rights of the parties, and a severance of the common interests is the only relief sought, there is ordinarily no final decree until the property is divided and the proceedings reported and confirmed; but it seems to us that it would be fully as reasonable to insist that a judgment for money is not final until the money is actually collected, or that a decree foreclosing a mortgage is not final until the property is sold, as to contend that, in such a case as the one under consideration, a decree establishing a controverted title is not final, because the interest of the successful party has not been actually set apart to him—that is, because the decree has not been executed.

It must be admitted that there is much confusion and ap-

parent conflict of opinion in the decisions upon this question ; but, if any definite rule can be extracted from them, it is that, when a court has settled the merits of the whole controversy, or has determined the rights of the parties in respect to the subject of the controversy, and the subsequent proceedings are necessary only for the purpose of executing the decree or judgment, according to the rights of the parties as already adjudged, the decree or judgment is final.

In *Forgay vs. Conrad*, 47 U. S., 201, Chief Justice Taney said : " And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one *to that extent*, and authorizes an appeal to this Court, although so much of the bill is retained in the circuit court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed ; " and in *Dainese vs. Kendall*, 119 U. S., 53, the Court said that a decree was final when it leaves the case " in such a condition that if there be an affirmance here the court below will have nothing to do but execute the decree it has already entered." In *Bostwick vs. Brinkerhoff*, 106 U. S., 3, Mr. Chief Justice Waite said that in order to make a decree final within the meaning of the acts of Congress giving the court jurisdiction on appeals and writs of error, it " must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already ren-

dered." The same or similar language has been employed by the Court in a great many cases. (See *Parsons vs. Robinson*, 122 U. S., 112; *Ray vs. Law*, 7 U. S., 179; *Whiting vs. Bank of U. S.*, 38 U. S., 6; *Bronson vs. La Crosse & M. R. Co.*, 67 U. S., 283; *St. Louis, I. M. & S. R. Co. vs. Southern Express Co.*, 108 U. S., 24; *Winthrop Iron Co. vs. Meeker*, 109 U. S., 180; and *Keystone Manganese & Iron Co. vs. Martin*, 132 U. S., 91, where the decisions on this question up to that time are cited and reviewed.)

The case of *Wheeling & Belmont Bridge Co. vs. Wheeling Bridge Co.*, 138 U. S., 287, was one in which the court below had adjudged the condemnation of property and appointed commissioners to ascertain what would be a just compensation, but the commissioners had taken no action, and the question was whether the judgment of condemnation was final. Among other things, the court said:

"The essential points of contention in the case related to the necessity of the property for the purpose of the petitioner, and to its necessity to the defendant for the proper exercise of its franchise. The judgment for the condemnation was conclusive upon both particulars. * * * If the judgment had been different, all further proceedings would have been ended. Being for the condemnation, the estimate of the compensation which was to follow was to be made by commissioners to be appointed and might therefore be treated as being a distinct proceeding."

After giving these reasons why the judgment was conclusive on the questions decided, the court stated, as an additional one, that it had been so treated by the appellate court of the State, and said: "We can hardly consider it in any other light in exercising our appellate jurisdiction."

The decisions of the State courts upon this question are very numerous, and, owing to the various statutory provisions regulating appeals and writs of error, it is not possible, within reasonable limits, to classify and discuss them; but it may be said, generally, that, when not controlled by such statutes, they conform substantially to the principles stated by this Court. In *Kreitline vs. Franz*, 106 Ind., 359, and *Jackson vs. Meyer*, 120 Ind., 504, it was held that when, in a suit for partition, the title of one of the parties is disputed, a judgment which adjudicated that question and ordered the property to be divided was final and appealable. (See also *Ansley vs. Robinson*, 16 Ala., 703; *Banton vs. Campbell*, 2 Dana (Ky.), 421; *Shepherd vs. Rice*, 38 Mich., 556; *Williams vs. Wells*, 62 Iowa, 747; *Talbot vs. Todd*, 7 J. J. Marsh. (Ky.), 462; *Bradford vs. Bradford*, 37 Ala., 453; *Jones vs. Wilson*, 54 Ala., 50; *Graham vs. Harding*, 4 Dana, 559; *Myers vs. Maury*, 63 Ill., 211; *Arnold vs. Sinclair*, 11 Mont., 556; *Sharon vs. Sharon*, 79 Cal., 633; *Balt. and Ohio R. R. Co. vs. P., W. & Ky. R. R. Co.*, 17 W. Va., 812, and *Thornton vs. Fitzhugh*, 4 Leigh, 209, quoted in *Fleming vs. Bolling*, 8 Gratt., 292.)

In all the cases where the judgments were held not to be final, there still remained some disputed question to be decided, affecting the substantial rights of the parties, such as cross-accounts between them to be investigated and adjusted, an amount or value to be ascertained upon testimony to be taken, in order to enable the Court to determine finally what the actual rights of the litigants were, or there was some express exception or reservation in the judgment or decree itself, showing that it was not intended to be conclusive.

So far as we are advised, all the decisions of this Court in

which judgments or decrees have been held not to be final were rendered in cases where the question of its jurisdiction to entertain an appeal or writ of error under the acts of Congress was involved, and in all such cases a very strict rule of construction has been adopted. In *Beebe vs. Russell*, 60 U. S., 283, and in *The Palmyra*, 23 U. S., 502, the Court declared that its practice was not to entertain an appeal or writ of error under the acts of Congress unless "the rights of the parties have been *fully* and finally determined;" or, in other words, that "the whole cause" must be finally determined, and the reason given was, that the cause could not be divided so as to bring up distinct parts of it. No such reason exists in this case; the decree claimed to be final is not before this Court on appeal or writ of error, and the jurisdiction of this Court is not involved. The question is simply, whether it was such a decree as the district court could, in view of the rights and interests determined by it, vacate or annul, without pleading or evidence or impeachment in any manner, after the expiration of the term at which it was rendered. That it distinctly adjudged substantial rights and interests which constituted the essential subjects of the controversy cannot be questioned, and, if it was not final and conclusive as to those rights and interests, it is difficult to see how the parties to a litigation can be concluded by the action of a judicial tribunal. A decree or judgment may not be appealable or subject to review on a writ of error, and yet be conclusive upon the parties as to all the matters adjudged, and be, also, beyond the power of recall by the court.

In the present case, the merits of the controversy were argued and submitted at one term and held under advisement until the next, and then the decree was rendered, re-

citing that it had been "heard upon the bill and amended bill and the answer thereto, the supplemental bill and answer, and the testimony on file, as taken in this cause," and the court then proceeded to adjudge and determine in favor of the complainants the whole matter in controversy between the parties concerning the right, title, and interest of the complainants in and to the land in dispute. It is perfectly clear that, if the determination of these questions had been in favor of the defendants, the whole controversy would have been ended, and all we contend for is, that their determination in favor of the complainants had the same conclusive effect as to the legal and equitable rights of the parties.

It does not purport to be an interlocutory decree, but an absolute and final adjudication upon all the controverted questions in the cause, leaving nothing further to be done, except to enforce the rights established, by executing the judgment of the court, and we submit that it must be treated as final in these proceedings. "An interlocutory decree is one made pending the cause, which leaves the determination of the particular question raised or the merits of the cause generally to a future hearing" (5 Am. & Eng. Enc. of Law, 371-'2; Freeman on Judg., sec. 29; Daniel Ch. Pr., 186; *Teaff vs. Hewitt*, 1 Ohio St., 511; *Williamson vs. Field*, 3 Barb. Ch., 281). Where the first decree in a suit for partition settles the rights of the parties, it is not interlocutory, but final. (*Ansley vs. Robinson*, *supra*; *Banton vs. Campbell*, *supra*; *Damouth vs. Klock*, 28 Mich., 163; *White vs. Mitchell*, 60 Tex., 164; *Williams vs. Wells*, 62 Iowa, 740.)

If the decree of 1865 was not final, neither was the order or decree of September, 1866, setting it aside and directing

conveyances to be made. The latter did not dispose of the whole cause; it did not dismiss the complaint, or approve any conveyances, or attest the payment of any purchase-money. In fact, no conveyance has yet been made in pursuance of that order or decree, and no part of the purchase-money has yet been paid to the infants or to the guardian *ad litem* for them.

IV.

If the infant heirs of Alfred Bent had any interest whatever, legal or equitable, in the land in controversy, whether that interest was based on a decree or not, the district court for the county of Taos had no power or jurisdiction to sell it, or to order or authorize their guardian *ad litem* to convey it in a compromise with their adversaries, or upon any other consideration. There was at that time no statute in the Territory of New Mexico conferring jurisdiction upon the courts to order or to authorize a sale of the real estate of infants, or of any interest therein, and, consequently, they had no power or jurisdiction over the subject, except such as belong to courts of chancery, according to the general rules and principles of our equity jurisprudence. Power to order the sale or encumbrance of the real estate of infants, except for the payment of debts, is not inherent in courts of chancery; it is a special power and must be conferred by statute, and the mode in which it shall be exercised must be, and always has been, prescribed by statute. In England, from which country our system of equity jurisprudence was derived, the court of chancery does not now possess, and never has possessed, a general power to decree such sales.

(See *In re* Haworth, L. R., 8 Ch., 415; *Fentiman vs. Fentiman*, 13 Sim., 171; *Taylor vs. Phillips*, 2 Ves., 23; *Russell vs. Russell*, 1 Moll., 525; *Calvert vs. Godfrey*, 6 Beav., 97; *Ware vs. Polhill*, 11 Ves., 278; *Ex parte Phillips*, 19 Ves., 122.) Under some circumstances, the court may permit charges to be created against the reversionary estates of infants, but they cannot order their sale for any other purpose than the payment of debts. (*De Witte vs. Palin*, L. R., 14 Eq., 251; *Munn vs. Hancock*, L. R., 6 Ch., 850.)

The case of *Charles Bent et als.*, heirs of *Alfred Bent, vs. The Maxwell Land Grant and Railway Company et als.* (No. 91) has twice been in the supreme court of the Territory—once by appeal from the judgment of the district court sustaining a demurrer to the bill, and again, on appeal from the decree refusing the relief prayed for and dismissing the bill. The first decision is reported in 3 *New Mexico*, 227, and in it the court expressly held that the district court had no power or jurisdiction to make the decree of September, 1866, upon the ground that there was no statute authorizing such a proceeding; and it held, further, that the decree of June, 1865, vested in the complainants a legal estate in the land in controversy, which, to the extent of the interest of their deceased father, had descended to the complainants in the action now pending. In thus holding, the court necessarily decided that the decree of June, 1865, was final, because it is plain that, if it was merely interlocutory, it could not vest a legal estate, or any estate, in the complainants. Having thus stated the law of the case, the supreme court of the Territory sent its mandate to the court below, commanding it to reinstate the suit on the docket "and further proceed therein according to law." (Rec. 91, pp. 22, 23.)

We insist that the questions decided by the supreme court on that appeal were not thereafter open for consideration or for a different decision in the district court, or in the supreme court itself, on the second appeal, and that the judgments now before this Court for review should be reversed on the ground, even if there were no others, that the law of the case, as it had been authoritatively established, was wholly disregarded by both tribunals. If the decision of the supreme court on the first appeal was erroneous, it could be corrected only by a proceeding for a rehearing, or by an appeal to this Court, and, until corrected by one or the other mode, the parties and the courts were bound by it in all subsequent proceedings in the case. The parties, in the preparation of their cause for trial, had a right to proceed upon the assumption that the law, so far as it related to the questions decided by the appellate court, was settled, and that there could not be a second appeal involving precisely the same matters and resulting in a decision directly in conflict with the one upon which they had relied during the progress of the litigation.

The cases in which it has been held that the court below is absolutely bound by the judgment of the appellate court, and that the same questions cannot be presented for consideration on two appeals or two writs of error in the same case, have generally arisen where the appellate tribunal, on the first appeal or writ of error, had, by its opinion and mandate, disposed of the entire controversy and prescribed the character of decree or judgment to be entered below, but, in several of them, the causes had simply been remanded for further proceedings, as in the case now presented. The principle, however, upon which the rule is based, and the evil it is intended

to prevent, are the same in both classes of cases. Whether the second appeal or writ of error was taken, or attempted to be taken, by the same party who prosecuted the first, or by his adversary, is immaterial, nor does it make any difference whether the attempt to reopen the question is made in the appellate court which finally decided it or in the inferior court to which the case has been remanded. The parties are concluded in all courts, and if this were not so the rule would be inoperative as a check upon useless and repeated litigation of the same question. "No question," says this Court *In re* Sandford Fork and Tool Co., 160 U. S., 247, "once considered and decided by this Court can be re-examined *at any subsequent stage* of the same case;" and in the case of *Roberts vs. Cooper*, 61 U. S., 467, where there was a new trial in the court below after the decision here, and the court below "was requested to give instructions to the jury contrary to the principles established by this Court on the first trial," the Court said: "It has been settled by the decisions of this Court that after a case has been brought here and decided and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second." And again it said: "There would be no end to a suit if every obstinate litigant could by repeated appeals compel a court to listen to criticisms on their opinions or speculate on chances from changes in its members." In these two cases, and many others, it was held that the opinion delivered by the appellate court could be examined to ascertain what questions that court had considered and decided, and what was the scope and meaning of its mandate.

In the latest case upon this subject—*Smith vs. Vulcan Iron Works*, 165 U. S., 518—there had been an appeal from the circuit court to the circuit court of appeals, which had reversed the decree of the lower court, and, on the filing of the mandate, that court dismissed the bill. A second appeal was then taken to the circuit court of appeals, not by the same party who had taken the first one, but by his adversary, and, that court having dismissed the appeal, the cause was brought here. This Court said: "And the merits of the case, having been once determined by the appellate court in reversing the interlocutory decree, were not open to reconsideration at a later stage of the same case, *either in that court or the court below*" (page 525). See also *Kingsbury vs. Buckner*, 134 U. S., 650, and the numerous decisions cited in that and other cases.

The territorial courts established by the laws of Congress constitute parts of the judicial system of the United States, and are as much bound by the rules and principles laid down in the decisions of this Court as the permanent district and circuit courts (*Montoya vs. Donohoe*, 2 New Mex., 214). If a circuit court or a circuit court of appeals of the United States had decided this case upon appeal or writ of error, in the same way that it was decided by the supreme court of the Territory on the first appeal, and it had been again brought by appeal or writ of error before the same appellate court, this Court would not have hesitated to declare, without waiting for argument, that the questions decided on the first appeal or writ of error were not open for reconsideration, and we are unable to discover any reason why the same rule should not be applied in a case decided by the supreme court of a Territory.

All new questions, if there were any, arising in the case after its return from the appellate tribunal were open to consideration by the court below, and might have been considered and decided by the appellate tribunal when the cause again came before it; but the questions settled upon the first appeal or writ of error, and the rules and principles of law upon which they were settled, are, for all the purposes of that case, forever disposed of. If the judgment of the appellate court was erroneous, the aggrieved parties had their remedy by application for a rehearing or by appeal to this Court, but they could not waive these proceedings and retry the same questions, either in the court of original jurisdiction or in the appellate tribunal. They could not "speculate on chances from changes" in the membership of the court, or repeat and prolong the litigation of the same questions for any other purpose. They could not even maintain a bill of review for alleged errors in the record prior to the return of the mandate of the appellate court. (*Southard vs. Russell*, 57 U. S., 547; *Kingsbury vs. Buckner*, 70 Ill., 514; *Brewer vs. Bowman*, 3 J. J. Marsh., 492.)

The question as to the finality of the decree of 1865 and the character and extent of the interest vested by it in the ancestor of the infant complainants, and the question as to the power and jurisdiction of the district court for Taos county, with or without the alleged consent of the guardian *ad litem*, to set aside that decree and order a sale or conveyance of the infants' interest in the land, were directly and necessarily involved, and were decided, on the first appeal. They did not arise in the case after its return to the lower court, nor did any other matter appear in the case after that time to render these questions less important or controlling

than they were when decided in the appellate court. They were, at the beginning, and continued to be throughout the litigation, the fundamental and controlling questions in the cause. The whole right of the complainants depended upon their decision.

The Maxwell Land Grant and Railway Company and Luz B. Maxwell (her husband, Lucien B. Maxwell, having died) were parties to the appeal in which the decision to which we have referred was rendered, and they are the only parties complainant—now appellees—in the other case (No. 90) now before this Court. The parties and the interests being the same, and the questions being the same in both cases, that decision was binding and conclusive in both, and the district and supreme courts of the Territory should have so held.

The case brought by the Maxwell Land Grant and Railway Company *et als.* against Guadalupe Thompson and the heirs of Alfred Bent (now No. 90) was once before in this Court on appeal, and was decided in December, 1877 (95 U. S., 391), and we concede that the decision then made was binding upon the lower courts and the parties at all subsequent stages of the cases, as to all the matters then in the record and considered and disposed of by the Court. It is necessary, therefore, to ascertain what was actually decided by this Court on that appeal. An examination of the opinion will show that, without considering or deciding the merits of the case, the decree below was reversed—

1. Because the complainants had "entirely failed to substantiate the *main fact* relied upon by them, namely, that the agreement for a compromise was concluded with Alfred

Bent in his lifetime." This fact has not yet been established, as the Court will see from the findings of the court below.

2. Because the decree which the complainants asked to have reviewed and set aside upon a bill of review was one to which they had themselves consented.

3. Because the bill of review was not brought by the original defendants, but by their assignee, The Maxwell Land Grant and Railway Company; and,

4. Because the bill sought "a reversal and modification of the decree upon an alleged matter of fact not appearing upon the record, namely, that the compromise agreement was made with Alfred Bent in his lifetime, without alleging any newly discovered evidence unknown to the parties before the decree."

In brief, the Court decided that a bill of review was not a proper proceeding to obtain relief in such a case, but that, inasmuch as considerable evidence had been taken, the complainants should have leave to amend their bill so as to convert it into a pleading to quiet title, with leave also to both parties to take additional evidence upon any new matter that might be put in issue by the amended pleadings. The mandate of this Court was strictly carried out in the court below, and all the subsequent proceedings in the case were consistent with it and with the decision upon which it was based; and, on the appeals now pending, this Court is not asked to make any ruling that would conflict with any proceeding had in either of the courts below in accordance with that decision and mandate.

But, independently of all the foregoing considerations, it is scarcely conceivable that any court in this country should have power to order a sale or conveyance of the real estate of infants, or of any interest therein, without any pleading or evidence to support its decree. So far as we know, there has never been a statute anywhere authorizing such a summary proceeding, and it would be a strange inconsistency in our judicial institutions if any court could, in the absence of express legislative authority, divest infants or other persons laboring under disabilities, of their estates in this manner, even should they or their guardians or committees attempt to consent.

In the carefully considered case of *The Bank of the U. S. vs. Ritchie*, 33 U. S., 128, the question arose under a statute of Maryland authorizing sales of real estate descended or devised to infants to pay the debts of their ancestor when it appeared that there was not sufficient personal estate left for that purpose, and when, "upon consideration of all circumstances, it shall appear to the chancellor to be just and proper that such debts should be paid by a sale of such real estate." A guardian *ad litem* was appointed for the infants, and he filed an answer consenting to the sale; but upon a bill of review the decree and all sales and conveyances made under it were reversed and set aside by this Court. Mr. Chief Justice Marshall said :

"He (the guardian) was appointed on the motion of the counsel for the plaintiffs without bringing the minors into court or issuing a commission for the purpose of making the appointment. This is contrary to the most approved usage and is certainly a mark of inexcusable inattention. The adversary counsel is not the person to name the guardian to

defend the infants. The answer of the infant defendants is signed by their guardian, but is not sworn to. It consents to the decree for which the bill prays, and without any other evidence the court proceeds to decree a sale of their lands. This is, we think, entirely erroneous. The statute under which the court acted authorizes a sale of the real estate only where the personal estate shall be insufficient for the payment of debts, when the justice of the claims shall be fully established, and when, upon consideration of all circumstances, it shall appear to the chancellor to be just and proper that such debts should be paid by a sale of the real estate. Independent of these special requisitions of the act, it would be obviously the duty of the court, particularly in the case of infants, to be satisfied on these points.

"The insufficiency of the personal estate of Abner Ritchie to pay his debts is stated in the answer of the administrator; but it is not proved, and is admitted in that of the guardian of the infants, but his answer is not on oath; and if it was, the court ought to have been otherwise satisfied of the fact.

"The justice of the claims made by the complainants is not established otherwise than by the acknowledgment of the infant defendants in their answer, that 'according to the belief and knowledge of their guardian, they are, as alleged in said bill, respectively due.' The court ought not to have acted on this admission. The infants were incapable of making it, and the acknowledgment of the guardian, not on oath, was totally insufficient. The court ought to have required satisfactory proof of the justice of the claims, and to have established such as were just before proceeding to sell real estate" (pp. 144, 145).

See also *Walker vs. Parker*, 38 U. S., 166, where the Court said:

"There is no evidence which will enable the Court to judge whether a sale or partition of the property would be to the advantage of the infant and the other parties; and it should

hardly be expected that this Court, in the absence of all evidence, should decree either of these alternatives against the answer."

In these cases the jurisdiction of the court to order the sale of infants' real estate for the payment of debts was unquestionable, and, consequently, the only inquiry was, whether the proceedings had been such as to sustain the validity of the decree; but, in the case now presented, there was no pretense that the sale or conveyance of the interest was made for the purpose of paying debts, and the court, therefore, had no jurisdiction, by statute or otherwise. To call this transaction a settlement or compromise does not change its real character in any respect, for, whether it is called a compromise or a sale, its effect was to relinquish or transfer the interest of the infants in the land. It was a sale both in form and substance, and it was treated as a sale by the court that ordered or authorized it, and by every other court in which the case has been heard. A formal conveyance upon an expressed consideration of six thousand dollars was made by the guardian *ad litem* of an undivided one-twelfth interest in the tract of land, "being the entire interest, estate, claim, and demand of the said Charles Bent, Julian Bent, and Alberto Silas Bent, said minor heirs of their father, said Alfred Bent, deceased," with all the usual covenants against incumbrances, and a general warranty. Nothing whatever is stated in the deed concerning a compromise or settlement of the suit, and it was, in fact, executed more than four months before the alleged consent order or decree. If it had been intended or considered merely as a compromise and settlement of a doubtful claim, it would have been necessary only to procure a release and have the bill dismissed; but Maxwell

actually purchased the interest of the infants from their guardian *ad litem* and accepted a deed for it, thereby admitting their title, and he and all claiming under him are estopped to deny it. If this transaction was in fact a mere settlement or compromise of a suit—a simple relinquishment of the complainants' claim to property which Maxwell supposed really belonged to him—and was so understood by the parties, it is most remarkable that he should have exacted from the guardian *ad litem* a full and complete conveyance, with a covenant against "all incumbrances" and a general warranty of title against all the world.

The circumstances under which this purchase was made are set out in the findings of the court below, to which we respectfully invite the particular attention of this Court. If, by reason of the statute governing these appeals, the question of actual fraud or undue influence in procuring the conveyance and the alleged consent to the decree cannot be investigated and decided by this Court, we nevertheless insist, that the facts certified in the records are of such a character as to make it the duty of the Court to withhold its sanction from the proceedings, unless the jurisdiction is clearly shown, and all the requirements of the law were strictly complied with.

In addition to the great wealth, power, and influence of Maxwell, his domineering disposition, his open threats, his misrepresentations as to the area of the tract of land, and the almost total ignorance and inexperience of the guardian *ad litem*—all which is found and certified—it appears that, although the deed acknowledges the payment in hand of six thousand dollars, no amount whatever was paid or secured to be paid, except by the personal note of the pur-

chaser, and that when the cases were finally tried, in 1893, no part of the money had been paid to the guardian *ad litem* or to the infants, and the note had passed into the hands of Maxwell (Rec. 91, p. 132; Rec. 91, p. 76). The court also finds and certifies that no compromise or sale was made by Alfred Bent in his lifetime, so that the order of April, 1866, and the order or decree of September, 1866, are without any support whatever, except the transaction between the guardian *ad litem* and Maxwell and the alleged consent, which we have shown was not in fact given and could not have been legally given.

The court below seems to have been unable to find the value of the interest of the infants in the land, and, therefore, merely refers to the conflicting evidence on the subject, but, under the act of Congress, the testimony is not here; and there is a total failure upon the part of the court to find and certify any fact conducing to show that the sale or conveyance ordered by the district court was advantageous in any respect to the interests of the infants, or that it was necessary or proper for any purpose. It clearly appears, however, from the opinion that the court was not satisfied from the evidence that the arrangement was advantageous to the infants. It says that "while we are not prepared, in view of the testimony submitted since the decision in *Thompson vs. Maxwell*, 95 U. S., 400, to say that 'the proofs show a case which, in our judgment, supports the conclusions of the decree to the effect that the terms of the compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants, and were so considered and accepted by the court in their behalf,' we do hold that the judgment

of the court at that time in so considering and accepting said terms was shown to be a fair and reasonable exercise of the chancellor's discretion," etc. Even if the district court had jurisdiction to make the decree, which we deny, it was not a case in which the rights and interests of the infants could have been disposed of at the discretion of the chancellor. According to the long-established rules of law and equity, such a decree must be supported by pleadings and evidence, and such facts must be shown as constitute a basis for the exercise of this extraordinary jurisdiction. It would seem, therefore, that the failure of the supreme court to find and certify any fact to support the decree must be fatal to its conclusion that it was a valid or proper exercise of power by the district court.

But, notwithstanding the court had no jurisdiction to decree the sale or conveyance of the interest of infants in real estate for any purpose, except, probably, in the absence of personal property, for the payment of debts due from the ancestor, it made an order purporting to authorize the guardian *ad litem* to convey, and afterwards a decree peremptorily directing a conveyance to be made, for a fixed sum, to a particular person, within ten days, without any pleading on the subject; without any inquiry as to the extent or value of the property or the condition of the infants; without fixing any time for the payment of the purchase-money or requiring any security; without making any provision for the reinvestment of the money or taking a bond from the guardian *ad litem* for its safe-keeping; without any evidence to show that a sale would be advantageous to the infants in any respect, or that it was necessary in order to provide for their nurture or maintenance; without giving them a day to appear

and reopen the decree, and without reserving any power over the decree itself or over anything that might be done under it, not even to the extent of requiring a report to be made. Such orders and decrees are not merely erroneous, but absolutely void and of no effect, and all acts done under them must fall with them.

It will be observed that the order and decree and the conveyance by the guardian *ad litem* were all made upon the supposition that Alfred Bent had died intestate, and that his interest in the land had descended to his heirs-at-law, the will not having been presented by either party in the case. The question as to the character and extent of the interest taken by the infants under the will is one which can be authoritatively decided only in a case between them and their mother, and we do not consider it necessary to discuss it at length in these cases. If they had at the date of the decree, and conveyance, and at the institution of these suits, any interest in the property, no matter how derived, they are entitled to relief. We think, however, that the will, if valid, devised to Guadalupe Bent a life estate only, during which she holds in trust for the maintenance of herself and children, and that, subject to the life estate, the property descended to the heirs-at-law of her deceased husband. It is clear that, if valid, it gives the children some interest, either legal or as *cestuis que trust*; and that, if invalid, they inherited the whole estate. But, in our opinion, under the laws in force in New Mexico at the time the will was executed, it was null and void, because it attempted to disinherit, partially, at least, the children of the testator, without stating a legal reason, or any reason, therefor. By the general laws of Spain, which were in force in New Mexico until changed

by local statute, no child could be disinherited by a parent, except for certain enumerated causes, which were required to be expressly stated in the will; and the disinheritance, in order to be valid, must be total, the child being, under the law, entitled to his equal share or nothing (Inst. of Civ. Law of Sp., 1 White, New Comp., 104, 106, 107, 108; *ibid.*, Introduction, p. x). By an act passed in 1846, but which was subsequently changed so as to make it conform to the new political relations of the Territory, it was provided that the laws theretofore in force concerning descents, distributions, wills, and testaments "as contained in the treatises on these subjects written by Pedro Murillo de Lorde (Velarde) shall remain in force so far as they are in conformity with the Constitution of the United States, and the statute laws in force for the time being" (Comp. Laws of 1884, sec. 1365). The act of January 12, 1852, provided that "parents and ascendants have the right to disinherit their descendants for the following causes," and it then proceeds to enumerate eleven grounds upon which a child or descendant may be disinherited (Comp. Laws of 1865, chap. 5, sec. 5; Comp. Laws of 1884, sec. 1416). An act passed in January, 1876, declared that "the common law as recognized in the United States of America shall be the rule of practice and decision." (See *Browning vs. Browning*, 3 New Mexico, 371; *Bent vs. Thompson*, 138 U. S., 114.)

Section 1414, of the Compilation of 1884, provides for various deductions from the estate of a decedent, and declares that what is left shall be equally divided among the children, their part being, in the language of the statute, "what is styled the legitimate portion of said children;" and in this respect it greatly resembles the civil law of Spain, heretofore cited.

In Velarde, ten legal causes for disinheritance are enumerated, and it is stated that "the act of disinheritance should be effected by naming the person to be disinherited, or by so describing him that there may be no doubt (regarding his identity), without condition, and must include all his goods (share), as otherwise it will be invalid. In order that the disinheritance of descendants may be valid the cause must be set forth and also proved by either the testator or by the constituted heir (devisee or legatee); this is not necessary if the heir tacitly or expressly consents to such disinheritance; in that case he shall have no right to oppose it, nor to be heard in judgment."

Velarde, chap. 8; title "Of disinheritance and of the 'inofficious' will."

A comparison of the provisions of the Institutes, the statutes and the law as laid down by Velarde will show that, while some changes have been made in the causes for which a descendant may be disinherited, certain specified causes must actually exist, and the manner in which the act of disinheritance, whether total or partial, shall be attested, in order to be valid, remains unaffected by legislation.

We respectfully ask that the judgments in both cases be reversed, with directions to the court below to dismiss the bill in the first case, and to set aside the order, decree, and conveyance of 1866 and execute the original decree of 1865, ordering a partition of the real estate in controversy.

J. G. CARLISLE,
 LOGAN CARLISLE,
For Appellants.

N^o. 90.

NOV 1 1897
JAMES H. McKENNEY

Brief of Springer for Appellees
IN THE
Filed Nov. 1, 1897.
SUPREME COURT

OF THE
UNITED STATES.

OCTOBER TERM, 1897.

No. 90.

GUADALUPE THOMPSON,
ET AL.,

Appellants,

VS.

THE MAXWELL LAND
GRANT AND RAILWAY
COMPANY, ET AL.,

Appellees.

*Appeal from the
Supreme Court of
the Territory of
New Mexico.*

BRIEF FOR APPELLEES.

FRANK SPRINGER,
Counsel for Appellees.



IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1897.

No. 90.

GUADALUPE THOMPSON,
ET AL.,

vs.

THE MAXWELL LAND
GRANT AND RAILWAY
COMPANY, ET AL.,

Appellants,

Appellees.

*Appeal from the
Supreme Court of
the Territory of
New Mexico.*

BRIEF FOR APPELLEES.

Statement.

This is an appeal from a judgment of the Supreme court of the Territory of New Mexico, affirming a decree rendered by the District court for

the Fourth Judicial District of that Territory in favor of complainants and appellees, quieting in them the title to the property in controversy. The property involved is an undivided one-twelfth interest in the Beaubien and Miranda Grant, or Maxwell Grant, as it is now better known.

This suit was begun in 1870, and proceeded to a decree in favor of complainants in 1873. Upon appeal to this court from the judgment of the Territorial Supreme court, affirming it, the decree was reversed, and the cause remanded for further proceedings in conformity with the opinion.

Thompson vs. Maxwell, 95 U. S. 391.

The case has been before the courts of New Mexico ever since, the litigation having been complicated by a number of collateral proceedings, one of them being another suit in the nature of a cross-action, involving the same facts and largely the same questions, which is now also before this court on appeal.

A full history of the litigation, and a statement and discussion at length of the questions involved, will be found in the brief for appellees in that case, *Bent vs. Miranda*, No. 91, on the present term calendar.

As the two cases are to be heard together, it is not deemed necessary to repeat that statement here, especially in view of the fact that the case now under consideration has already been before this court, and the issues are fully stated in the opinion by Mr. Justice Bradley, in 95 U. S. 391.

It is believed that the greater part of the discussion in case No. 91 is unnecessary, and that the controlling question for both cases has been deter-

mined by this court in the decision above mentioned, when taken in connection with the facts as now found by the Supreme court of New Mexico, and certified in the record for the purpose of this appeal.

The decree rendered in 1873, in favor of complainants, was reversed by this court upon a question of pleading. The bill on which it was founded was framed as a bill of review, to reverse and modify a decree entered in September, 1866, vacating a former interlocutory decree, and directing a conveyance of the interests of the Bent heirs to Maxwell, in pursuance of a compromise of the litigation; and it also prayed that the defendants be decreed to have no interest in or title to the premises, equitable or otherwise, and that complainants be decreed to hold the premises free of all trusts, etc.

It was held by this court that the relief sought could not be had upon such a bill as a bill of review, because—

1. It sought to reverse a consent decree.
2. It was filed by an assignee of the original defendant, thus making different parties.
3. It sought to reverse and modify the decree upon matter of fact not apparent on the record.

An inspection of the opinion and the order remanding the case clearly shows that while the decree was reversed for the above reasons, it did not hold adversely to the complainant's case as disclosed by the record; but that on the contrary it held that upon the facts then shown they were entitled to the substantial relief they sought if it were asked by a bill in proper form, pointed out the changes necessary to constitute such a bill, and

remanded the case,—not for dismissal, but for further proceedings, the nature and limits of which were distinctly pointed out;—all with a view to securing to complainants the benefit of the relief to which they were evidently entitled.

The following extracts from the opinion on pages 398, 399 and 400, will show that this statement of the effect and intent of the decision is correct:

“The case, it is true, is somewhat anomalous. The decree sought to be set aside by the bill of review was not made in pursuance of the relief sought by the bill in the original cause, and was not based upon the pleadings and evidence therein. It was a decree for confirming and carrying out a settlement of the controversy, which had produced a change of interest. The original suit was instituted by the heirs of Charles Bent, to establish an equitable interest in an undivided share of the lands, and for a partition thereof. A decree was made establishing the right, ordering the partition, and appointing commissioners to make it. This was as far as the suit progressed. It was then settled, and the decree in question was entered by consent, setting aside the decree for partition, and carrying out the settlement. The bill of review alleges the fact to have been that the settlement was made by Alfred Bent in his lifetime, and that the decree ought not to have set aside the former decree establishing his rights, and ought not to have directed the guardian of his infant heirs to execute a conveyance; but ought to have declared the land discharged from the trust, upon payment by Maxwell of the agreed consideration to Alfred’s personal representatives. In other words, the bill of review insists that the decree was misconceived and erroneous, in view of the state of facts out of which it grew, and which did not appear in the record of the cause.

“We do not think that the peculiarity of the

case, however, takes it out of the ordinary rules that apply to a bill of review. *A decree for carrying out a settlement and compromise of a suit is certainly not, of itself, erroneous. When made by consent, it is presumed to be made in view of the existing facts, and that these were in the knowledge of the parties. In the absence of fraud in obtaining it, such a decree cannot be impeached.* (P. 398.) * * *

“Tested, therefore, by any law of procedure which may be invoked in its support, the bill in this case, considered as a bill of review, seeking to reverse, modify, and reconstruct the decree of September, 1866, cannot be sustained. Nevertheless, the general purpose which it evidently had in view—the quieting of the title to the land in question—is one towards which a court of equity is always liberally disposed, as tending to promote the peace of society and the security of property. *And if, instead of seeking to reverse the decree of September, 1866 (which, for like reasons of public policy, as applicable to the security of judgments that have passed into rem adjudicatam, is not allowable), the bill had sought to carry that decree more effectually into execution, it it would have been free from legal objections, and equally conducive to the object in view.*” (P. 399.) * * *

“The decree of September, 1866, has never been carried into effect by any act done since it was made. It directed that Maxwell should pay the money stipulated for by the compromise, and that the defendant should execute deeds of conveyance. But the parties seem to have assumed that their previous acts performed in May, 1866, were a sufficient compliance with the directions of the decree. Yet the decree does not take notice of this fact.

Now, in order to execute this decree, or to determine whether it has or has not been substantially executed, and to determine and declare the effect of such execution upon the rights of all concerned, and thus remove any cloud from the title arising from the imperfection of the proceedings, it was perfectly

competent for the parties to file a bill conceived and constructed to that end. The bill in this case, as originally filed, before it was converted by amendment into a bill of review, and abating the allegations of error in the original decree, approximated to the character of such a bill as might have been sustained. *The proofs show a case which, in our judgment, supports the conclusions of the decree, to the effect that the terms of compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants, and were so considered and accepted by the court in their behalf.* But, so far as the present decree undertook to reverse and modify the decree of September, 1866, we think it is clearly erroneous. Still, although we feel obliged to reverse the present decree, *we do not think that the bill should be absolutely dismissed. And, as the whole question between the parties has been fully litigated on the proofs,* it would be unreasonable to require that these should be taken over again.

Our conclusion is, that the present decree must be reversed with costs, and that the cause be remanded to the court below, with directions to allow the complainants to amend their bill as they shall be advised, and *with liberty to the defendants to answer any new matter introduced therein;* and that all the proofs in the cause shall stand as proofs upon any future hearing thereof, with liberty to either party to take *additional proofs upon any new matter* that may be put in issue by the amended pleadings; and it is *So ordered.*" (Pp. 400-401.)

In amending the bill after the case was remanded to the Territorial court, complainants followed strictly the intimations of the opinion. Instead of introducing new matter, the amendment was made by eliminating from the former bill all allegations and prayers which made it a bill of review, and leaving it a simple bill to quiet title, of the character

which this court had declared would have been proper. (Rec. pp. 62-70.)

Defendants thereupon filed further answers, setting up an entirely new defense, alleging that the deed of Guadalupe Bent, and the decree of September, 1866, were procured by Maxwell through imposition, deceit, misrepresentation and fraud. (Rec. pp. 70-85.)

Upon exceptions to these answers, the District court struck out the portions alleging the new matters, for the reason that they were not authorized by the decision and mandate of this court, which limited the right of further answer to new matter introduced into the bill. The case then proceeded to a final hearing, and a decree in conformity with the prayer of the bill. This decree was reversed by the Supreme court of New Mexico on the ground of error in sustaining the exceptions to the new answers, and the case was remanded with direction to the lower court to restore the portions of the answers which had been stricken out.

Thompson vs. Maxwell, 3 N. M. (Gild.)
448.

We believe this decision of the Territorial Supreme court to have been erroneous, and in direct conflict with the mandate of this court. There was nothing in these new answers which was not perfectly within the knowledge of Guadalupe Thompson and her husband, and if true might have been set up in their answers to the original bill made ten years before. Nothing can be more certain than that this court did not intend the case to be litigated afresh, but that on the contrary it did intend that the case should proceed to decree upon the proofs as they

stood, unless complainants, in amending their bill, should introduce new matter therein.

Further proofs were then taken upon the amended pleadings as restored pursuant to the mandate of the Territorial Supreme court (Rec. p. 97), and the case proceeded to final decree a third time, declaring that the defendants have no interest in or title to the property in controversy, and decreeing that the same is held by complainant and its assigns free from all trusts, right, title, interest or claim of defendants. (Rec. p. 98.)

This decree was affirmed by the Supreme court of New Mexico.

Maxwell vs. Thompson, 7 N. M. 581 (Rec. pp. 100, 136); and upon appeal from that court is now here a second time for review.

The Territorial court, pursuant to the Act of April 7, 1874 (18 Statutes at Large, 27), has certified as a part of the record a statement of the facts established by the evidence (Rec. pp. 101-133) which is conclusive.

San Pedro Co. vs. United States, 146 U. S. 130.

From this statement the following facts appear:

1. That after the interlocutory decree of June 3, 1865, the Bent heirs, complainants in the suit, entered into negotiations with Maxwell for a compromise of the litigation; that Alfred Bent, acting for himself and his co-complainants by their authority, and upon the advice of one of their counsel, made overtures to Maxwell for a compromise, visiting him at his residence for that purpose; that he demanded \$21,000 for a release of the claim of the Bents, and Maxwell offered \$18,000; that Alfred returned with-

out having effected a definite agreement with Maxwell as to price; that the Bents considered the sale as good as made, expected to close the bargain in a few days, but Alfred told his co-complainants that they could get a few thousand more by being quiet a few days; that they were ready to make the deeds, and the deeds were already written out by one of them; that before anything further was done, Alfred Bent died in December, 1865. (Rec. p. 118.)

2. That after the death of Alfred Bent negotiations for a compromise were resumed, the Bent heirs being then represented by Scheurich, husband of Teresina, one of the adult complainants, who acted on behalf of his wife, Estefana, and her husband, and Guadalupe Bent; that a settlement was concluded with Maxwell by Scheurich, acting for the adult complainants and Guadalupe Bent as guardian *ad litem* for the children of Alfred Bent, which was acceptable to them, by which Maxwell was to pay \$18,000 for the conveyance of the interest or claim of the Bent heirs; that this compromise was advised by Merrill Ashurst, another and the leading counsel for the Bent heirs; that it was accepted and carried out by the adult complainants and their husbands, and Guadalupe Bent, who all executed deeds accordingly. (Rec. pp. 125-6.)

3. That at the April term, 1866, an order was made in the cause, on motion of the solicitors for complainants, by which Guadalupe Bent was appointed guardian *ad litem* for the minor heirs of Alfred Bent, "with full power to execute deeds, or to carry into execution all sales or transfers made of their interest in and to the real estate therein described, to Lucien B. Maxwell" (Rec. p. 125); that

Guadalupe Bent executed her deed to Maxwell in pursuance of said compromise, as such guardian *ad litem*, under and by virtue of said decree and order, which is recited at large in her deed. (Rec. pp. 126-128.)

4. That at the September term, 1866, a decree was entered, setting aside the interlocutory decree by which a one-fourth of the grant had been decreed to complainants, and directing Maxwell to pay complainants \$18,000, and directing complainants—naming the adults and their husbands, and Guadalupe Bent as guardian *ad litem* for the three minor children of Alfred Bent—to execute and deliver to Maxwell deeds conveying all their right, title, interest and claim in and to the lands in controversy. (Rec. pp. 129, 130.)

5. That no fraud, imposition, or error has been shown to have entered into said transaction, or to have brought about said compromise decree. (Rec. p. 132.)

Argument.

The effect, therefore, of all that has been done by way of amended pleadings and new proofs, is to bring this case back to the situation in which it would have been before this court twenty years ago, if the features of the bill which made it a bill of review had been omitted. This court then found that there were negotiations for compromise commenced before the death of Alfred Bent; an agreement concluded afterwards, which was acquiesced in by the other parties, including the widow of Alfred, acting in behalf of her children; which agreement and compromise were advantageous to the infants, and were so considered and accepted by the court in their behalf. There is nothing in the proofs taken since, even if these conclusions of the court were re-examinable now, to weaken or modify them, but they are rather greatly strengthened by the additional facts in the record. The effort to overcome them by showing that the settlement was procured by fraud has totally failed. That was the only new element attempted to be introduced into the case since the mandate. Everything else was before the court on its former decision.

In the answer filed by Guadalupe Thompson and her husband to the Maxwell Company's original bill in 1871, the invalidity of the decree of 1866, and proceedings connected therewith, was distinctly alleged; as the following extracts from said answer (Rec. pp. 39, 40) will show:

“ Respondents further answering say, that as to the proceedings alleged by complainants to have taken place at the term of the court held in and for

the county of Taos, on the ninth day of April, 1866, they beg leave to refer to the record of said court for a full, perfect and more certain answer herein without admitting the validity and legality of the same, but as administratrix and administrator as alleged in complainants' bill protesting against the same as illegal, unjust and void as to the minor children aforesaid.

"As to the allegations of plaintiffs touching the supposed order or decree and the effect of the proceedings in this Honorable court last above referred to, these respondents are not competent to answer, as they are advised that they are questions of law, wherefore they are all referred to this Honorable court for its decision. They deny, however, that by said proceedings the minor heirs of Alfred Bent, deceased, were in any manner divested of any title, either legal or equitable, they had at the time in the said grant or tract of land.

"These respondents admit that the said agreement was fully carried out in good faith by the said surviving plaintiffs, Teresina Bent, now Sheurick, and Estefana Bent, now Hicklin, and their husbands so far as they were bound and affected by the same, by their respectively executing and delivering to the said Maxwell the conveyances referred to in complainants' bill, and that respondent, Guadalupe Thompson, also acted in good faith in making the pretended deed on her part, but that she was wholly ignorant of her duties, obligations and responsibilities as guardian, *ad litem*, of the minor children aforesaid, or as commissioner in chancery, to carry into effect, sales, &c., and wholly ignorant of the rights of the said minors in the premises; but as to whether the said trust, or equitable interest, or claim of the said Alfred Bent, and his said minor heirs, was wholly terminated and extinguished, or not, respondents are not competent to answer; these likewise being questions of law referable to this Honorable court for decision; but they are advised that the said supposed deed of conveyance by the said Guadalupe Thompson

was illegal and void, and wholly inoperative so far as the right and interests of the said minors are concerned."

The question of the validity of the decree of 1866, and its effect in extinguishing the claim of the Bent heirs, was distinctly before this court upon the former hearing, and was necessarily a paramount question upon which the whole case turned. For if, as the answer alleged, the decree and all the other proceedings, including the deed of Guadalupe Bent, were "illegal and void as to the minor children;" and did not in any manner divest them "of any title, either legal or equitable, they had at that time in the said grant;" and were "wholly inoperative so far as the right and interests of the said minors are concerned;" then complainants' case, as then made, would have failed, not simply on a question of pleading, but on the merits, and their bill would necessarily have been dismissed. In holding, as this court did, that the bill should not be dismissed; and that "if, instead of seeking to reverse the decree of 1866, the bill had sought to carry that decree more effectually into execution, it would have been free from legal objection;" and that "the proofs show a case which supports the conclusions (of the decree) to the effect that the terms of compromise * * * were advantageous to the said infants, and were so considered and accepted by the court in their behalf;" that the decree itself "cannot be impeached, except for fraud in obtaining it;" and that finally "the whole question between the parties has been fully litigated on the proofs;" it must necessarily have passed upon every question which now is, or ever could be, raised as to the validity and effect of that decree and proceedings—with the sole exception of

those which might arise under a proper allegation of fraud—and decided them adverse to the allegations of the answer, both then and now.

This brings the case within the rule laid down in *Roberts vs. Cooper*, 20 How. 481, and quoted and restated as the settled doctrine of this court in *Kingsbury vs. Buckner*, 134 U. S. 670, viz.:

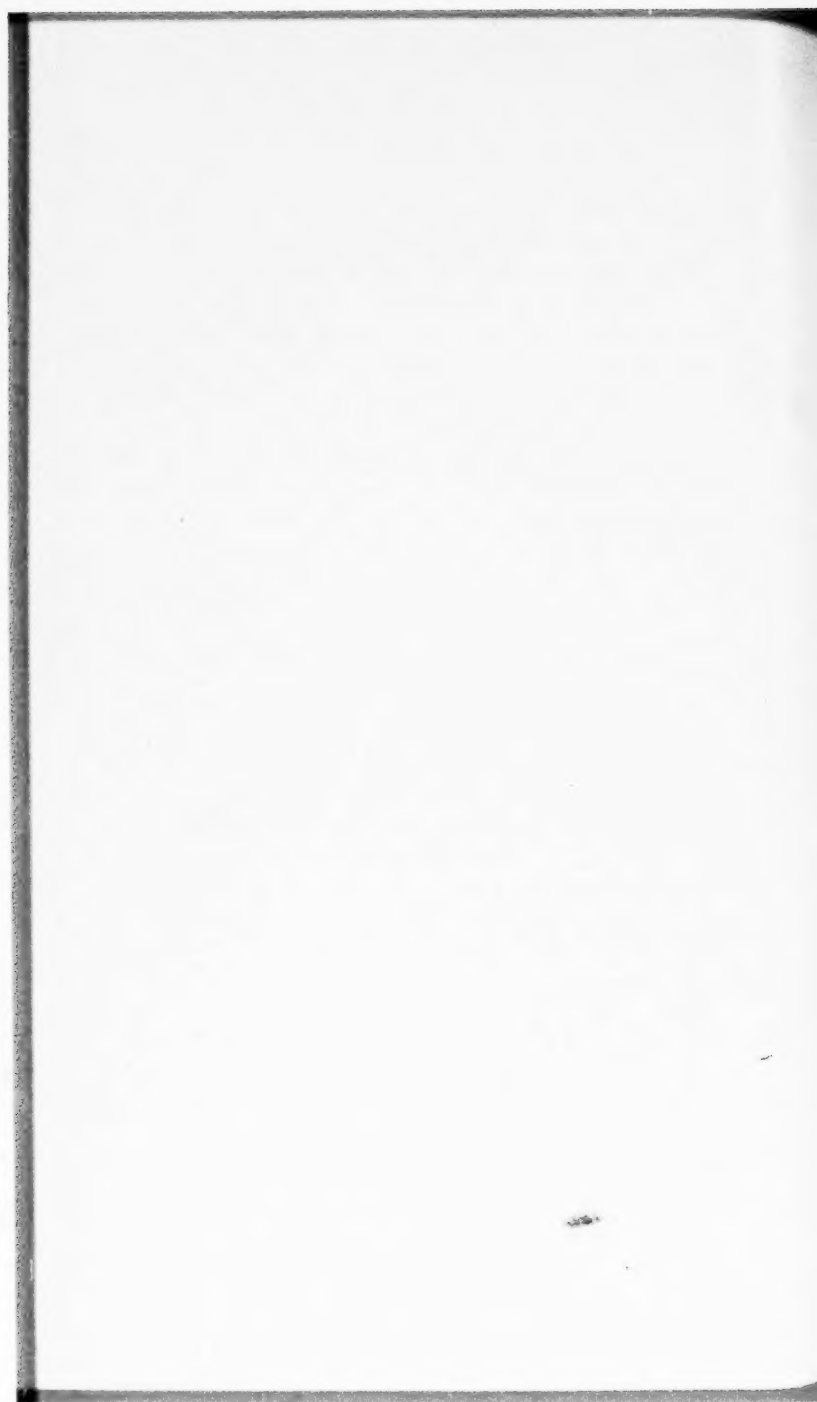
“It has been settled by the decisions of this court that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or re-examined upon the second.”

Fraud, alleged since the mandate, and the only thing not before the court on the former decision, has been found to be nonexistent. The case is, therefore, *res adjudicata*, both as to the facts and the law, and it stands now before this court precisely as if the case had gone to final decree upon the bill as now amended, and the same proofs that were before the court in 1877. We thus have now, as then, a compromise, acquiesced in by all the parties, accepted by the court on behalf of the infants as advantageous to them; a decree which the court declared to be not of itself erroneous, and which, in the absence of fraud in obtaining it, cannot be impeached; and we have besides the one thing which was lacking before: a bill to quiet title based on these facts, instead of a bill of review. With this kind of a bill, the decree would have been affirmed by this court before, beyond any question. That upon the facts as they appeared then, and equally appear now, and with the bill changed as intimated in the opinion of the court,

complainants are entitled to the relief they now pray, and which has been decreed to them by the *nisi prius* and appellate courts of New Mexico, is the *law of this case*, as distinctly adjudicated by this court. No other decision seems possible now, on any theory, and argument on the proposition seems superfluous.

Respectfully submitted,

FRANK SPRINGER,
Counsel for Appellees.



No. 90.

Brief (Sup^r) of Springer, Britton
& Droune for Appellees

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Nov. 2, 1897.

GUADALUPE THOMPSON ET AL.,
APPELLANTS,

v.

THE MAXWELL LAND GRANT AND
RAILWAY COMPANY ET AL.

No. 90.

*Appeal from the Supreme Court of the Territory of
New Mexico.*

SUPPLEMENTAL BRIEF FOR APPELLES.

I.

THE LAW OF THE CASE—MATTERS RES ADJUDICATA.

The briefs of opposing counsel treat the former decision of this Court in this cause (Thompson v. Maxwell, 95 U. S. 391) as determining only a question of pleadings, to wit, that relief sought—the quieting of title in the Maxwell Company—could not be had upon a bill of review

but must be founded upon a bill in the nature of a bill to execute the prior consent decree of 1866. Upon that assumption all that this Court in fact decided, both in fact and law, is swept out of view of counsel upon the suggestion that it is pure *obiter*. Neither the assumption nor the authorities in its support can be applied hereto.

Manifestly, the *only* purpose of the Maxwell Company in filing the original bill was to *quiet* its title by a decree which should extinguish any possible latent equity thereafter to be claimed on behalf of the Bent heirs. No matter what its form, *that* was its express object. The bill as thus filed did not deny the validity of the 1866 decree, but necessarily assumed its validity. It simply suggested a possible doubt upon the title of the Maxwell Company, unless such doubt was removed by supplemental decree. But the defendants (who are the same defendants here) did in terms deny the validity of the 1866 decree as binding them or in any way affecting their interests. Thus by the pleadings it became an issue of fact, whether (1) a compromise was made as to them, and (2) whether it was actually carried out.

The proof taken upon these issues was before this Court when the cause first came here. It was the province of this Court to decide upon the narrow question of complainants' imperfect pleading, and upon that ground to *dismiss* its bill. But this Court did the exactly opposite thing of declaring that it would not dismiss the bill, but reverse and remand the cause in order to permit the bill to be amended to fit the relief required, so that on such amendment the final decree giving the complainants the relief they were found justly entitled to upon the proof might be entered. By thus keeping the cause in Court and passing judgment upon the facts this Court rendered *res adjudicata* all the issues of fact (except possibly the

allegation of fraud set up for the first time by the defendants after the cause was here determined) which the case now presents. It was part of the issue as made by the pleadings whether a compromise had been made covering the interest of the Bent heirs. For this was the foundation of the complainants' right to relief in equity, and was squarely denied by the defendants' answer. Yet this Court found :

"The effect of the evidence appears to be that although negotiations were commenced before his death, no agreement was concluded until after that event, *when it was concluded by his brother-in-law, Scheurick, and was acquiesced in by the other parties, including the widow of Alfred, acting in behalf of her children.*" (Opinion, p. 399.

"The proof shows a case which, *in our judgment*, supports the conclusion of the decree, and the fact that the terms of the compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants, *and were so considered and accepted by the Court in their behalf*" (p. 400).

Manifestly, it was upon these findings that this Court, in the exercise of its undoubted power and deliberate judgment, declined to dismiss the proceedings, but remanded the case for amendment, because, as the opinion further states (p. 400) :

"And as the whole question between the parties has been fully litigated on the proofs, it would be unreasonable to require that they should be taken over again."

We insist that these were express adjudications of the facts in issue, which, upon principle and authority, closed all further inquiry or adjudication thereon.

Otherwise, and in such a case, it would result that the

deliberate judgment of the Court in thus finding upon the facts would lull the complainant into security from which he would be rudely awakened, if, as a matter of law, the Court's opinion upon these facts was pure *obiter*, binding upon no one.

But as Mr. Wells, in his work on *Res Judicata* and *Stare Decisis* (p. 300), aptly remarks :

"SEC. 380. The decision of facts by a court of equity is held to be conclusive on the parties, even if the bill is finally dismissed on the ground that there is an adequate remedy at law." * * *

The authorities cited on our original brief, and the most recent adjudication of this Court—The Southern Pacific case (71 of present term)—are ample to demonstrate that these findings of fact in this case are conclusive here on this second appeal.

THE LAW OF THE CASE.

This has been directly determined by the prior decision, and to the points :

First. That the consent decree involved is not of itself erroneous, and "In the absence of fraud in obtaining it, such a decree cannot be impeached." (Op. 398.)

Second. That the decree of September, 1866, upon grounds of public policy as applicable to the security of judgments, has passed into *rem adjudicatem*, and, except for fraud, is not subject to reversal.

The law on this subject cannot be more conclusively or forcibly stated than as given by Mr. Wells in his work *supra*, p. 569 *et seq.*

We may add, with great propriety, that the former decision on the points of law stated simply applies well-settled principles.

II.

STATUS OF MAXWELL LAND COMPANY.

Neither the decree of 1865 nor the consent decree of 1866 stands *per se* as a muniment of legal title. Neither was self-executing and neither, in the absence of statute so declaring, could pass title, except by some formal conveyance.

In that situation, it is important to note that when the Maxwell Company purchased in 1870, these deeds from the Bent heirs were of record; the company admittedly purchased for a large consideration, and had the right to stand upon the recorded chain of title. The recorded deed from Guadalupe Bent, as guardian *ad litem*, etc., recites on its face the order of 1866, entered by the Court, authorizing her to make such deed. Assuming such recital to have put the company upon notice of this chancery proceeding, brought by the Bent heirs, the company, in resorting to such record, would have found only the decrees of 1865 and 1866, without the pleadings or proof on which they were entered, for it is a fact, appearing by the record in the former case, that it was not until 1872 or 1873 that *any* of the pleadings in the cause were found, and it is the express finding of the Court below on this appeal (Rec. 130) that the record of this chancery proceeding does not show whether or not any inquiry was made by the Court or by its authority concerning the value of the land or as to the disposal thereof for the best interests of the infant heirs, &c. In that state of the record, the company had the right to invoke, on its behalf, those presumptions which the settled wisdom of judicial tribunals has constantly exercised in assuming that in ways proper and sat-

isfactory to the chancellor he had learned the facts, and determined the wisdom of making the compromise on behalf of the infant heirs. Or to state it in the language of this Court in the former decision, that the terms of compromise "were advantageous to the said infants, and were "so considered and accepted by the Court in their behalf."

In other words, the record, so far as then available, gave the Maxwell Company and any other purchaser the full right to rely upon the orders of the Court allowing this compromise, and to assume that the facts had been stated with full authority and acquiesced in by the Court in the exercise of sound judgment. All collateral facts sustain that conclusion. (1) With respect to price, the heirs of Beaubien had sold to Maxwell their undoubted legal title for consideration much less than the record shows was paid to the heirs of Bent for the compromise of a doubtful and litigated claim; and (2) the inventory upon the estate of Alfred Bent, which disclosed that the decedent's debts largely exceeded his personal estate. Therefore, the conclusion is fully justified that the compromise of this claim was necessary to furnish the infant children of Bent with necessary maintenance. The findings of fact upon present appeal do not alter but affirm these conclusions, and hence the record under present discussion, nearly thirty years after the fact, shows nothing on which to challenge the correctness of the conclusion indulged in 1870 by the Maxwell Company.

Moreover, that company, as a purchaser for value, and its numerous grantees who have since purchased from it, are far more entitled to the protection of a court of equity than are the appellants. For it must be remembered that the order of the Court admitting the infant heirs as complainants, and its decrees authorizing the sale and con-

veyance of their interests, were made upon the motion of counsel acting for the Bent family. It was a family settlement in which all were interested, and which obviously all desired to have carried out. With respect to the heirs of Bent, it was completing an arrangement for compromise initiated by their ancestor in his lifetime. This fully answers all *technical* argument now indulged attacking the form or correctness of the judicial orders and decrees on which this family settlement was effected. The fact that these proceedings were required by Maxwell, a purchaser in no just sense, throws the onus of blame or liability therefor upon the Maxwell Company, a subsequent purchaser. It was not the interest or claim of the Alfred Bent heirs *alone* that was the subject of compromise, but the extinguishment of the entire claim of the Bent family. The shafts of argument attacking the technical correctness of proceedings taken by appellants' own counsel and in effecting a family settlement cannot strike the Maxwell Company as a subsequent purchaser, nor should a court of conscience so apply them. It must also be remembered that the proceedings took place at a time when New Mexico was part of the frontier, remote from railroads, and judicial proceedings were not and could not be conducted with that absolute precision which marks those sections in which all the conveniences of civilization are at hand, with well-stocked libraries accessible to bench and bar. The partition suit in this case is docketed as Cause No. 1, in chancery, for the District Court of Taos county, and we may remark in passing that the mind which framed the decree of 1865, then headed same as a—

"BILL IN CHANCERY FOR PARTITION OF REAL ESTATE."

(Record, 23.)

We repeat, in a word, that orders and decrees entered in such early days and under such frontier conditions, and on the motion of parties to be benefited thereby—the Bent family—cannot now be subject to microscopic examination, and with resulting destruction of the titles of innocent subsequent purchasers, without doing violence to all notions of both moral and legal equity.

It is well settled that rights of infants in equity stand subordinate to those who purchase for value.

Am. & Eng. Eng. of Law, vol. 10, p. 696, and authorities cited.

And this doctrine applying to legal estates of infants must have stronger application here with respect to mere equities and to the compromise of a doubtful and litigated claim.

III.

PAYMENT OF COMPROMISE PRICE.

Supplementing our original brief, we desire only to suggest—

1st. The facts now found show the note given in payment was delivered to Maxwell, the maker thereof, and grantee of the Bent interest. The explanation of Thompson that it was so delivered for the purpose of having a credit endorsed thereon is wholly untenable. Such delivery and continued retention thereof by the maker raises the presumption of payment, which must stand, unless rebutted by controlling proof. The rule is concisely stated by Mr. Greenleaf, in his work on evidence, sec. 38, thus :

"Thus, where a bill of exchange, or an order for the payment of money, or delivery of goods, is found in the hands of the drawee, or a promissory note is in the possession of the maker, a legal presumption is made that he has paid the money upon it and delivered the goods ordered."

The same rule is repeated in *Am. & Eng. Enc. of Law*, Vol. 18, page 206, with citation of many authorities in its support.

The situation of the parties; the obvious desire of the Bent family, all and singular, to make this compromise and receive money in lieu of a litigated and doubtful claim, all combine to increase the force of this presumption in the present case. It may well be that payment was made in whole or in part with personal property. Exchange and barter is the rule of frontier civilization, remote from railroads and with necessarily limited circulation of money. But we submit this Court will not, more than thirty years after the fact, assume against subsequent purchasers that payment was not made.

2nd. The Maxwell Company had the *right* to rely upon the consideration expressed in the deed from Guadalupe Bent as conclusive in matter of amount and payment, for the rule is well settled that—

"it is competent to prove by parol what the real consideration agreed to be paid was, and to show that the same or some part of it remains unpaid, *though not thereby to impeach the title conveyed by the deed.*"

Washburn on Real Property, Vol. 3, p. 327, 619.

The consideration may remain a matter of indebtedness, with the right to sue therefor as on a money demand between the grantor and grantee. Manifestly, it cannot

affect subsequent purchasers taking without notice of its non-payment.

The long pursuit of the patent upon the grant from the United States ; the Government's attack thereon and the necessary and great expense imposed upon the Maxwell Company in making of surveys, and subsequent litigation with the United States, are matters familiar to the Court, and are disclosed by its own records (121 U. S. 325 ; 122 *ib.* 365). In all this effort and expense, involving many thousands of dollars and years of labor, the present appellants contributed nothing, but they are eager to seize and enjoy the fruit of the toil and expenditure of those whose sole fault is that they relied upon solemn records and judicial decrees which are now sought to be impeached by technical arguments from learned counsel. Thousands of individuals hold title to town and farm property, by conveyance from the Company, within this grant. Its development and disposal has proven a most costly enterprise. We submit, these appellants are not entitled to disturb these titles under the case as now presented in this record.

Respectfully submitted.

FRANK SPRINGER,
A. T. BRITTON,
A. B. BROWNE,
Counsel for Appellees.

91.

NOV 1 1897

JAMES H. MCKENNEY,

CLERK

Brief of Springer for Appellees.

Filed Nov. 1, 1897.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1897.

No. 91.

CHARLES BENT ET AL.,
Appellants,

VS.

GUADALUPE MIRANDA

ET AL.,

Appellees.

*Appeal from the
Supreme Court of
the Territory of
New Mexico.*

BRIEF FOR APPELLEES.

FRANK SPRINGER,

Counsel for Appellees.

IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1897.

No. 91.

CHARLES BENT ET AL.,

Appellants,

v.

GUADALUPE MIRANDA

ET AL.,

Appellees.

*Appeal from the
Supreme Court of
the Territory of
New Mexico.*

BRIEF FOR APPELLEES.

STATEMENT.

This in an appeal from a judgment of the Supreme Court of New Mexico affirming a decree of the Fourth

Judicial District Court in and for Colfax county, in favor of appellees, dismissing the bill of complaint, which was brought to review; impeach and annul a final decree of the District Court for Taos county, entered in September, 1866, and to re-establish a previous interlocutory decree of the same Court, entered in June, 1865.

The subject of the present litigation is the undivided one-twelfth interest in the Beaubien and Miranda Grant, or Maxwell Grant, as it is now usually called. In its various forms the controversy has extended over a period of thirty-eight years, and has been five times before the Supreme Court of the Territory and twice before this Court. Although the case has been made to appear complicated by reason of the number and variety of the proceedings taken in it, yet the question presented for decision, when rightly understood, is really a simple one. This will be greatly facilitated by an orderly history of the case, which I shall endeavor to give at the outset.

Being an equity cause, tried by the Court without a jury, the evidence is not embodied in the record, but instead of it the Territorial Supreme Court has certified and sent up as part of the record a statement of the facts established by the evidence in conformity with the Act of Congress, approved April 7, 1874. (18 Stat. at Large, p. 27.) This statement is found on pages 45 to 77 of the Record, and it is conclusive as to the facts.

San Pedro Co. v. United States, 146 U. S. 130.

In the history which follows, the facts are taken from the statement aforesaid, and in order to avoid needless repetition, I shall interpolate some discussion of questions that arose in the antecedent stages of the litigation, and which bear upon the issues presented in the case now before the Court.

HISTORY OF THE LITIGATION.

The Maxwell Land Grant was made by the Government of Mexico in 1841 to two persons, namely, Charles Beaubien and Guadalupe Miranda. They entered into possession of it in 1843, and thenceforward they and their heirs and vendees continued to possess and occupy it exclusively and for their own use and benefit, claiming the ownership thereof. In October, 1859, Alfred Bent and his two sisters, Estefana and Teresina (the former the wife of Alexander Hicklin and the latter soon after becoming the wife of Aloys Scheurich), set up a claim to one-third of the property.

They began an action in chancery in the District Court for the county of Taos, against Beaubien, Miranda and Maxwell—the latter having acquired an interest in the grant by purchase from the others—in which they claimed to be the owners of an undivided one-third of the grant, and prayed a partition thereof. These complainants were the children and heirs-at-law of one Charles Bent, who had died in 1847 at Taos; and it appears by their original and amended bill of complaint that the foundation of their claim was a "*verbal understanding*" (Rec., p. 47) between their father, Charles Bent, and the grantees, Beaubien and Miranda, by which in consideration of the "*exertion, influence, and instrumentality*" of Bent, through which the "grant was obtained from the Mexican Government" (Rec., p. 46),* or, as otherwise stated, his "*aid, assistance, and influence in and about the procuring said grant from the Mexican Government*" (Rec., pp. 49-50), they were to "*give to him*" the undivided one-third of

* The references in this brief are to the Record in No. 91, except where otherwise stated.

the grant. No other consideration was alleged ; nor was it alleged that this supposed verbal understanding was ever carried into effect by the execution of any conveyance, or by the delivery of possession to Bent ; nor that Charles Bent had ever asserted or claimed ownership in or possession of the grant or any part of it, although he resided at Taos, within a short distance from the property, for four years after the grantees were formally invested with possession by the Mexican authorities. No writing of any description was pleaded or produced, or claimed to exist, either as evidence of the contract itself, or of its execution.

The defendants were required by this bill to make answer upon oath, which they did ; and their answers have, therefore, the force of evidence.

Miranda answered that he knew of no such interest or connection of Bent in or to the grant. (Rec., p. 52.)

Beaubien's answer denied absolutely the fact of the alleged agreement or understanding, or of the pretended consideration therefor ; but stated that he at one time in conversation told Bent that if he obtained the grant he would make Bent a present of one-fourth part, but not an undivided part. And he further said that from the time the grant was made up to the death of Bent in 1847, he did not offer, nor did Bent request him, to carry into effect such verbal promise. He stated that the grant was obtained mainly by the exertions of Miranda, who became an equal participant with him therein. He says that he once offered to donate a tract of land within the grant to Bent's children, out of kind feeling for them, which they refused to accept. He denies that Bent ever rendered any service in obtaining the grant ; or that he or Miranda had ever acknowledged or recognized Bent as having an interest in the grant ; or that Bent or his heirs ever con-

tributed to the settlement, protection, or defense of the grant. (Rec., p. 53.)

Issue was joined on these answers, and the case finally came to a hearing in June, 1865.

It is evident that the complainants, on their own showing, had no shadow or semblance of an interest in the property which would entitle them to a partition. Taking the allegations of their bill to be true, their only claim to title rested upon an unexecuted parol agreement to *give* an interest in land, unaccompanied by delivery of possession or part performance of any kind; and without any consideration except an alleged one which would have rendered the whole contract, if otherwise proved by competent evidence, absolutely void.

An agreement for the conveyance of land, resting solely in parol, is void by the Mexican law. If unaccompanied by delivery of possession, or part performance, it could not be enforced either under Mexican or American law.

Harris v. Brown, 1 Calif. 98.

Hoen v. Simmons, 1 Calif. 120.

Stafford v. Lick, 10 Calif. 16.

No authority can be produced, either under the common law or the civil law, holding that an interest in land, either legal or equitable, can pass by such an agreement, even if it were free from the fatal taint of illegality.

But such a contract, for a contingent compensation for procuring legislative and executive action in disposing of public property to individuals, is void, no matter whether the contract contemplated the use of improper means or not. All such arrangements are held to be against public policy, and the courts everywhere, both State and Federal, refuse to recognize or enforce them.

Marshall v. R.R. Co., 16 How. 334.

Toll Co. v. Norris, 2 Wall. 54.

Trist v. Child, 21 Wall. 441, 448.

Fuller v. Dane, 18 Pick. 472.

Chippenger v. Hepbaugh, 5 Wats & Serg. 315.

Rose v. Truax, 21 Barb. 361.

No testimony appears in the record, though it is presumable that some was taken, in view of the recital in the interlocutory decree that the case was heard on the pleadings and the testimony taken in the cause. (Rec., pp. 113-114.) It is not possible that any better case could have been made out for complainants than that stated in their bill; while in the nature of things it is in the highest degree improbable that any testimony could have been produced to overcome the sworn answers of the two defendants denying the parol agreement.

Nevertheless, for some reason not apparent at this remote day, the Court rendered an interlocutory decree finding the equities in favor of complainants—not for the interest claimed in their bill, but for a different one—and directed partition to be made accordingly. This decree is one of the pivotal facts upon which the present litigation turns, and a correct apprehension of its character and effect will, in my opinion, lead to an easy solution of the whole controversy.

I therefore invite the Court, at the outset, to a consideration of two things:

1. *What was this decree?*
2. *What was its effect?*

1. Purport of the Decree of 1865.

The decree of June 3, 1865, is found on pages 58 to 62 of the Record. Stripped of its verbiage, it is to the following purport:

1. It finds that Charles Bent "was justly and equitably entitled and seized of one undivided fourth part" of the grant; and that the complainants, Alfred, Estefana, and Teresina, succeeded to his interest, and are "fully and absolutely entitled" thereto; and the same is declared established and confirmed to them; and

2. It orders that partition be made of one-fourth to them, and the other three-fourths in two equal shares, the one to Maxwell, and the other to the son and daughters of Beaubien.

3. It appoints commissioners to make the partition, under certain regulations and conditions prescribed in detail, which require them to examine and consider the various qualities of land, the improvements made by Maxwell under Beaubien and Miranda, and make a proper allowance therefor; and to assess the value of the land covered by such improvements without their being added to the land, and also the value of the improvements by themselves; "and report the facts with their general report to the Court, . . . so that the Court may decree justly and equitably concerning the same between the parties."

4. It orders the commissioners to assess and report the value of the rents and profits of the portions occupied and cultivated.

5. It orders the commissioners to make full report of their proceedings to the next term of the Court.

6. It declares that "*the Court now reserves and suspends making its decree as to the partition and payment of the costs in this cause until a future term of this Court.*"

7. It orders that "this cause stand continued until the next term of this Court."

It is this preliminary decree, never carried into effect, under which the commissioners never acted or reported, and which was afterwards vacated by the Court which

entered it, which our opponents claim to have the effect of converting the shadowy and inequitable claim of the Bent heirs into a legal title, beyond the reach of the Courts to disturb.

It is plain from the reading of this order, that while the Court found and defined what were the relative interests of the parties in the first instance, yet it also perceived that there were a number of important things to be ascertained and considered before it could finally adjust the equities of the case and divide the property. There was much more of this preliminary work to be done than is usual in partition suits; and, therefore, the Court, not content with leaving the nature of this order to be interpreted by the well-known rules governing partition proceedings, in express terms reserved its decree as to the partition until a future term, and continued the case.

2. Effect of the Decree of 1865.

This statement of the provisions of the order of June 5, 1865, is sufficient to show that it was not a final decree, but that it was a mere interlocutory order. It created no estate, conferred no title, and did not even put the parties in a position to appeal from the finding of the Court as to the moieties. It was the ordinary interlocutory decree in partition suits, and was fully within the control of the Court which made it; and might be revised, modified, or vacated by the Court for any reason that might seem proper, at any time until the final decree upon the report of the commissioners.

It is important to remember that at the date of this decree in 1865, and prior thereto, there was in New Mexico no statute conferring jurisdiction on courts of chancery to establish and quiet title to lands. The existing statute on that subject was enacted in 1884.

Session Laws of New Mexico, 1884, Chap. 6.

Nor was there any statute providing for the partition of real estate. That law was passed in 1876.

Session Laws of New Mexico, 1876, Chap. 3.

And the amendment to it authorizing an appeal from the first decree in partition determining the interests in 1893.

Session Laws of New Mexico, 1893, p. 25.

Such a decree as this was is not final, and cannot be appealed from.

Freeman on Judgments (2nd Ed.), secs. 29-34.

Freeman on Co-Tenancy and Partition, sec. 319, and cases cited.

Phillips, Supreme Court Practice, 85-95.

This is the settled doctrine of this Court :

Perkins v. Fourniquet, 6 How. 206, and 16 How. 82.

Pulliam v. Christian, 6 Id. 210.

Craighead v. Wilson, 18 Id. 199.

Beebe v. Russell, 19 Id. 283.

Humiston v. Stainthorp, 2 Wall. 106.

Green v. Fisk, 103 U. S. 518.

Bostwick v. Brinkerhoff, 106 U. S. 3.

Grant v. Phoenix Ins. Co., 106 U. S. 429.

Parsons v. Robinson, 122 U. S. 112.

Keystone Co. v. Martin, 132 U. S. 91.

Lodge v. Twell, 135 U. S. 232.

McGourkey v. R.R. Co., 146 U. S. 536.

Also of the Supreme Court of New Mexico :

Huntington v. Moore, 1 N. M. 471.

And of various State Courts :

Ivory v. Delore, 26 Mo. 506.

Durham v. Durham, 34 Mo. 447.

- Parkin v. Allen*, 29 Mo. 233, 236.
Griffin v. Griffin, 10 Ind. 170,
Cook v. Knickerbocker, 11 Ind. 230.
Chester v. Gibson, 15 Ind. 10.
Williams v. Field, 2 Wis. 421.
Dickinson v. Godwise, 11 Paige 191.
Kuster v. Stark, 19 Ill. 328.
Delashal v. Geiser, 36 Kas. 374.
Holloway v. Holloway, 97 Mo. 628.
Turpin v. Turpin, 88 Mo. 337.
Murray v. Yerkes, 73 Mo. 13.
Medford v. Hurrel, 3 Hawks. (N. C.) 41.
Bybee v. Sammers, 4 Oregon, 354.
Beebe v. Griffin, 6 N. Y. 464.
Lee v. Henderson, 75 Tex. 190.
Furnan v. Furnam, 12 Hun. 441.

The first decree in partition, ascertaining the moieties and directing a partition, is only an interlocutory decree.

Freeman and Co-Tenancy and Partition, sec. 516
 17 Am. and Eng. Encyl. of Law, 749-751.

"In suits for partition the Court must determine the interests of the co-tenants, and whether partition shall be made by sale of the property or otherwise; but it is not until the confirmation of the partition, either by sale or allotment, that a final decree exists."

1 Freeman on Judgments (2d Ed.), sec. 32.

5 Am. and Eng. Encyl. of Law, 371, 373.

Williams v. Field, 2 Wis. 421.

In 17 Am. and Eng. Encyl. of Law, pp. 748-9, the character and effect of the judgment for partition, upon the latest authorities, is given as follows;

"After the disposition of the issues, or upon the coming in of the report of a referee in a proper case, an inter-

locutory judgment for partition should be given. It is the province of this judgment to determine and declare all the rights, titles, and interest of the parties, and of each of them, in the property, leaving nothing open or in reserve, except mere matters of detail in carrying it out." (P. 749.)

"The interlocutory judgment, in an action for partition, directing a division or sale of the premises in question, is *not a final decree*, but *merely an interlocutory order*." (P. 751.)

All interlocutory decrees are under the control of the Court which made them until final decree, and may be revised or vacated if the Court thinks proper.

Fourniquet v. Perkins, 16 Howard, 82.

Gibson v. Reese, 50 Ill. 383.

Gibson v. Orehore, 5 Pick. 157.

Park v. Johnson, 7 Allen, 378.

Davis v. Roberts, 7 Sm. & M. 543.

Kelley v. Stanberry, 18 Ohio, 408.

2 Dan. Chy. Pr., 1511, note 1.

And may be set aside at a term subsequent to that at which they are entered.

Com. v. Beaumarchais, 3 Call. (Va.) 122.

Dobbs v. Dobbs, 27 Ala. 646.

Thompson v. Pebbles, 6 Dana (Ky.) 387.

In support of the proposition that the interlocutory decree of 1865 was final, appellants rely chiefly upon the case of *Forgay v. Conrad*, 6 How. 201.

Examination of the opinion in that case shows that the decision was based upon peculiar circumstances, and was distinctly limited by the Court to the facts of the case, which readily distinguish it from other cases involving the question of finality of decrees. Under no possible construction can it be made an authority for a case like

the one at bar. The following quotation from the opinion will show this clearly :

“ Here the decree not only decides the title to the property in dispute, and annuls the decision under which defendants claim, but also directs the property in dispute to be delivered to complainant, and awards execution. And according to the last paragraph in the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the Master. In all other respects *the whole of the matters brought into controversy by the bill are finally disposed of* as to all of the defendants, and the bill as to them is *no longer pending before the Court*, and the decree which it passed could not have been afterwards reconsidered or modified in relation to the matters decided, except upon a petition for a rehearing within the time prescribed by the rules of this Court regulating proceedings in equity in the Circuit Court. If these appellants, therefore, must wait until the accounts are reported by the Master and confirmed by the Court, they will be subjected to irreparable injury. For the lands and slaves which they claim will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt, before they can have an opportunity of being heard in this Court in defense of their rights.”

The Court then, by way of emphasizing the fact that this was an exceptional case, criticised the action of the lower Court in entering the final decree ; pointed out the difference between the practice in England, where appeals to the House of Lords may be taken from an interlocutory order which decides the right of property in dispute, and in the United States, where such appeals cannot be taken ; and then said further :

“ In the case before us, for example, it would certainly have been proper and entirely consistent with chancery practice, for the Circuit Court to have announced, in an interlocutory order or decree, the opinion it had formed

as to the rights of the parties, and the decree it would finally pronounce upon the title and conveyances in contest. But there could be no necessity for passing immediately a final decree, annulling the conveyances, and ordering the property to be delivered to the assignee of the bankrupt. The decree upon these matters might and ought to have awaited the master's report; and when the accounts were before the Court, then every matter in dispute might have been adjudicated in one final decree; and if either party thought himself aggrieved, the whole matter would be brought here and decided in one appeal."

In the very next case, *Perkins v. Fourniquet*, 6 How. 206, 208, the Court gave a practical illustration of the operation of the rule it had laid down in *Forgay v. Conrad*. This was an action for an accounting, and the partition of community property—not for an accounting alone, as appellants say in their brief.

The existence of any community was denied by the answer. Upon the hearing the Circuit Court passed a decree declaring that a community existed; that the plaintiffs had "the right to recover" a certain share of the community property; referred the matter to a Master to take and report an account of the acquets, prescribing fully and with proper precision the principles and manner in which the lands acquired were to be divided and the accounts taken; and reserved all other matters in controversy between the parties until the coming in of the Master's report. Upon appeal from this decree this Court said:

"This clearly is not a final decree in any respect. It is the common and ordinary interlocutory order or decree passed by courts of chancery in cases of this kind, and is absolutely necessary to prepare the case for a final hearing and final decree, where the complainant is entitled to a *partition of property* or an account. For the principles

upon which an account is to be stated by the Master, *or a partition made*, cannot be prescribed by the Court until it *first determines the rights of the parties by an interlocutory order or decree*; and the case cannot proceed to final hearing without it. And the appellant is not injured by denying him an appeal in this stage of the proceedings. *Because these interlocutory orders and decrees remain under the control of the Circuit Court, and subject to their revision, until the Master's report comes in and is finally acted upon by the Court, and the whole of the matters in controversy between the parties disposed of by a final decree. And upon an appeal from that decree, every matter in dispute will be open to the parties in this Court, and they all be heard and decided at the same time.*"

The subsequent history of this case presents a clear illustration of the nature and effect of such interlocutory decrees, and of the control which the Courts have over them. After the dismissal of the appeal and remanding of the cause, pursuant to the decision in 6 Howard, it proceeded as far as a hearing on the Master's report, when the Circuit Court "reconsidered the opinion it had expressed on the merits in the interlocutory order, and believing that opinion to be incorrect, dismissed the plaintiff's bill."

Fourniquet v. Perkins, 16 How. 82 (quoted from opinion by the Chief Justice on p. 84).

Plaintiffs then appealed to this Court, contending that the action of the Circuit Court was erroneous, "because made at the argument made upon exceptions to the Master's report, and contrary to the opinion on the merits expressed by the Court in its interlocutory order." Thereupon this Court said:

"This objection cannot be maintained. The case was at final hearing at the argument upon the exceptions, and

all of the previous interlocutory orders in relation to the merits were open to revision and under the control of the Court. This Court so decided when the former appeal hereinbefore mentioned was dismissed for want of jurisdiction. And if the Court below, upon further reflection or examination, changed its opinion, after passing the order, or found that it was in conflict with the decision of this Court, it was its duty to correct the error."

This doctrine has been reaffirmed by the Court in a recent case.

"In decretal orders, the whole case is open for review, and the Court may change its rulings relating to the merits when the cause comes on for final hearing upon the account. *Fourniquet v. Perkins*, 16 How. 82."

Latta v. Kilbourne, 150 U. S. 540.

Craighead v. Wilson, 18 How. 199, was an action in chancery by certain heirs claiming interest in an estate, to establish their rights and have distribution of the property. The Court made a decree, ascertaining the heirship and relative rights of complainants, and referring the matter to a Master to take an account, to ascertain what property in kind remains in possession of defendants; the sale and profits thereof; to make allowance for improvements, etc. From this decree an appeal was taken, which was dismissed by this Court, saying:

"In no legal sense of the term is the decree now before us a final one. The basis of the decree, embracing the equities in the bill, is found, but the distribution among the parties in interest depends upon the facts to be reported by the Master. . . . Until the Court shall have acted upon this report and sanctioned it, giving to each of the devisees his share of the estate under the will, the decree is not final."

In *Beebe v. Russell*, 19 How. 283, this Court finds it necessary to instruct the *nisi prius* Courts, by giving elementary definitions of the two kinds of decrees :

"A decree is understood to be interlocutory whenever an inquiry as to the matter of law or fact is directed, preparatory to a final decision. Where the decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the Court, so that it will not be necessary to bring the cause again before the Court for its final decision it is a final decree."

In *Lodge v. Twell*, 135 U. S. 232, the Court holds that when the thing left to be done was something more than the mere ministerial execution of the decree as rendered, "the decree was interlocutory and not final, *even though it settled the equities of the bill.*"

The same authorities relied on by appellant to prove that this was a final decree were reviewed by this Court in *McGourkey v. R.R. Co.*, 146 U. S. 536, 545, *et seq.* The Court cites with approbation the two cases in 6 Howard, viz., *Perkins v. Fourniquet*, 206, and *Pulliam v. Christian*, 209, and says of *Forgay v. Conrad* :

"The case of *Forgay v. Conrad* has generally been treated as an exceptional one, and as was said in *Craighead v. Wilson*, 18 Howard, 199, 201, as made under the peculiar circumstances of that case, and to prevent a loss of the property, which would have been disposed of beyond the reach of an appellate Court before a final decree adjusting the accounts could be entered. A somewhat similar criticism was made of this case in *Beche v. Russell*, 19 How. 283, 287, wherein it was intimated that the fact that execution had been awarded was the only ground upon which a finality of the decree could be supported."

And the Court once more states the general rule as follows (p. 545):

"It may be said in general that if the Court make a decree *fixing the rights and liabilities* of the parties, and thereupon refer the case to a Master for a ministerial purpose only, and no further proceedings in Court are contemplated, the decree is final; but if it refer the case to him as a subordinate Court and for a judicial purpose, as to state an account between the parties, *upon which a further decree is to be entered*, the decree is not final."

The rule in New Mexico as to appeals from orders and decrees in chancery, under the law as it existed in 1865, was announced in

Huntington v. Moore, 1 N. M. 417.

There the Supreme Court of the Territory pointed out clearly the distinction between interlocutory and final decrees, and held that under the Organic Act and statutes of the Territory none but final decrees and judgments, which "finally dispose of the merits in the case," were appealable. The decree appealed from directed the payment of a sum of money by defendants to plaintiff "to be credited to defendants on the final accounting." It was claimed that this was final, because it directed the absolute payment of money immediately, and was enforceable by execution; and there, as here, the case of *Forgay v. Conrad* was relied on to sustain the contention. The Court held that that case could not apply, because in *Forgay v. Conrad* "the whole of the matter brought into controversy by the appeal was finally disposed of." The Court said:

"Orders are frequently and necessarily made during the progress of a cause, and while such orders may and

frequently do affect and enter into the merits of the cause, they are interlocutory only, and intended as a means of advancing the interest of the parties under the control of the Court until the rights of the parties can be adjudicated by a final decree. * * * The order in the case before us was made during the progress of the case, and while it was an order for the payment of a specified sum of money, and affected and entered into the merits of the cause, it was not final, for the reason that it did not dispose of the merits of the whole case." (P. 474.)

The appeal was accordingly dismissed.

Nevertheless it is contended by appellants, with much elaboration in their briefs, that within the rule laid down in these authorities the decree in question was final, because they say that it left only ministerial acts to be done by the commissioners. A simple reading of the decree, with its explicit direction to the commissioners to report upon a multitude of facts "so that the Court may decree justly and equitably concerning them," and its reservation in express terms of its decree as to the partition "until a future term," ought to dispose of that contention.

But as a complete and final answer to appellants' entire argument on this question, we quote the decision of this Court in—

Green v. Fisk, 103 U. S. 518.

That case was a direct action for partition of real property. Complainant was decreed to be the owner of one-half of the property, and the case was referred to a Master "to proceed to a partition according to law, under the direction of the Court." Defendant appealed from this decree, but the appeal was dismissed because the decree was not final.

This Court said:

" In partition causes, courts of equity first ascertain the rights of the several persons interested, and then make a division of the property. After the division has been made and confirmed by the Court, the partition, if in kind, is completed by mutual conveyances of the allotments to the several parties. Mitford, Eq. Pl. (4th ed. by Jeremy) 120; 1 Story, Eq., sect. 650; 2 Daniell, Ch. Pr. (4th Am. ed.) 1151.

"A decree cannot be said to be final until the Court has completed its adjudication of the cause. Here the *several interests* of the parties in the land have been *ascertained and determined*, but this is merely preparatory to the final relief which is sought; that is to say, a setting off to the complainant in severalty her share of the property in money or in kind. *This can only be done by a further decree of the Court.* Ordinarily, in chancery, commissioners are appointed to make the necessary examination and inquiries and report a partition. Upon the coming in of the report the Court acts again. If the commissioners make a division the Court must decide whether it shall be confirmed before the partition, which is the primary object of the suit, is complete. If they report that a division cannot be made and recommend a sale, the Court must pass on this view of the case before the adjudication between the parties can be said to be ended.

" In this case a partition by sale was asked for, because the property was not susceptible of division in kind. That the Court has not ordered, and the reference to the Master was undoubtedly to ascertain, among other things, whether such a proceeding was in fact necessary in order to divide the property. The Master was in everything to proceed under the direction of the Court. He had no fixed duty to perform. He was the mere assistant of the Court, not in executing its process, but in completing its adjudication of the partition which was asked. There are still questions, in which the parties have each a direct interest, and *they must be determined judicially* before the relief has been granted which the suit calls for.

" In foreclosure suits it has been held that a decree which settles all the rights of the parties and leaves nothing to

be done but to make a sale and pay over the proceeds is final for the purposes of an appeal. The reason is that in such a case the sale is the execution of the decree of the Court, and simply enforces the rights of the parties as finally adjudicated. *Here, however, such is not the case, because still the Court must act judicially in making the partition it has ordered. What remains to be done is not ministerial but judicial.* The law has prescribed no fixed rules by which the officers of the Court are to be governed in the performance of the duty assigned to them. The Court is still to exercise its judicial discretion in directing the movements and approving the acts of its assistants, until it has finally settled and determined on the details of the partition, if made in kind, or directed a sale by the ministerial officers and prescribed the rules for a division of the proceeds."

It is argued in appellants' brief that the labor and expense of making the partition *should* not be required as a condition precedent to the right of appeal, because it was a hardship. But it *was* invariably required, and it was to obviate this very difficulty that statutes have been passed in various States allowing an appeal in partition suits from the interlocutory decree—among them that of New Mexico in 1893.

Such being the character and effect of the interlocutory order of June, 1865, what was the situation of the parties and the case, after the adjournment of that term? Naturally, the defendants were dissatisfied with the finding of the Court in favor of complainants, and with the order for partition, and proposed to appeal whenever the case reached the point at which an appeal could be taken. As it was then they could not appeal, but must wait until after the commissioners had reported and the Court had adjusted the equities from the information thus obtained,

and had made its final decree as to the partition.* In the meantime the case, with all its interlocutory orders, remained in the control of the Court. It could vacate any of these orders. It could dismiss the bill for want of equity, or because the complainants had shown no title authorizing partition, thus leaving nothing to be partitioned. Nothing had been finally adjudicated, nothing was settled. And it was this consideration—a certainty of protracted litigation, involving large costs and expenses, ending no one knew when—that brought about the compromise which followed, and which is the next important matter in the order of events.

The commissioners appointed by the order of June, 1865, never acted. (Rec., p. 62.) Maxwell, who had in the meantime acquired the interests of Maranda and Beaubien's heirs, declared that he would appeal the case, and if necessary carry it to the Supreme Court of the United States. The Bent heirs, complainants in the suit, entered into negotiations with Maxwell for a compromise of the litigation, on the basis of Maxwell's paying them a money consideration to relinquish their claim. (Rec., p. 62.)

Here let us stop to inquire: What was the claim which they had to relinquish?

This is the question to which much of the subsequent proceedings relate back, and upon it the entire case of our opponents absolutely depends. Unless their interpretation of the nature of the Bent claim at this juncture is correct, their whole case falls to the ground. Even if it should be correct, however, their case will fail completely for other reasons.

* No statute then existed in New Mexico allowing an appeal from the decree determining the moieties in partition: the present statute to that effect was passed February 2, 1893.

Laws of New Mexico, 1893, p. 25.

They contend that by virtue of the interlocutory decree of June, 1865, an absolute legal estate in one-fourth of the property became vested in the Bent heirs, and that such estate was thereby conclusively and finally established in them, and that all future proceedings by which their claim was sought to be relinquished, transferred or extinguished, must be tested by the strict rules applicable to the disposal of perfect legal estates.

But the mere statement of the facts already given shows this position to be utterly untenable. Even so far as it went, the decree, as I have shown by the overwhelming authorities already cited, was conclusive upon nobody. It was still within the control of the Court which rendered it, and could be modified or vacated at any time before the final decree should be made, after the coming in of the commissioners' report. The suit was still pending. "Pendency of the suit," as stated in *Kester v. Stark*, 19 Ill. 330, being a case of partition, means "any time before it is finally disposed of. Until that time it is before the Court, and entirely subject to its control and jurisdiction."

As already stated, at the time when this decree was rendered, there was no statute in New Mexico providing for and regulating partition proceedings. The present law on that subject was not enacted until 1876. The suit begun by the Bent heirs in 1859, and all the proceedings had therein, were necessarily under the general chancery practice and jurisdiction, as administered in the High Court of Chancery in England, unaided by any statute. It was a suit *for partition*, both in name and in purpose. If divested of that feature the whole proceeding must fall to the ground for want of jurisdiction in equity to sustain it.

Reference to the original bill of 1859, and the amendment to it in 1860 (Rec., pp. 46-51), will show that its

allegations and prayers were those of a suit for partition upon an alleged admitted interest. There was no prayer for the establishment of title in complainants. On the contrary, the theory of the bill was that the undivided interest of complainants was confessed by defendants, and that the only controversy was as to the manner of division of the shares.

The moment their title was denied, as it was by the sworn answers of Miranda and Beaubien, the jurisdiction of equity was ousted, because, as this Court has said in *Gay v. Purpart*, 106 U. S. 689, "this system does not deal with or decide questions of controverted title."

And, as said by this Court in *McCull v. Carpenter*, 18 How. 297, 302—

"The most that the Court would have been justified in doing in the usual course of proceeding would have been to have stayed the suit in partition till the question could have been settled at law. The proceedings in partition are not appropriate for a litigation between parties in respect to the bill."

In any aspect of the case the bill is what the parties themselves made it. No matter what other sort of a bill *might* have been filed, the fact remains that the bill which complainants *did* file, was a partition bill, and nothing else, and the suit must fall within the rules governing the finality of decrees in partition suits.

Our learned adversaries in the Court below contended that the nature of the suit was twofold; and they said of it:

"The bill sought: First, the establishment of the *equitable* rights of complainants in the grant, and *to transform such equitable right into a legal estate by the decree of the Court*; second, after the establishing of their rights, the

partition of the estate among those legally entitled thereto. These matters were in their nature distinct. They could properly have omitted from their bill the prayer for partition."

The purpose of this statement as to the nature of the suit was to lay the foundation for the argument which followed, that it is not to be treated as a partition proceeding at all; and thus to escape the force of the decisions upon the finality of decrees in suits of that character. If by this species of legerdemain they could succeed in transforming the original bill of thirty-eight years ago from what its framers, its opponents, and its judges all understood it to be, into something it was not, it would only bring them into worse difficulties than before. For such a transformation would be an easy matter compared with the one they assume to have been proposed or accomplished by the bill; therein they essay the impossible. There is no known head of Equity Jurisprudence under which such a bill could have been maintained or such relief granted. There was in New Mexico no statute, such as now exists, for quieting the title by establishing the complainant's estate; and there was no proceeding known to equity in which, by force of the decree itself, an equitable right could be "transformed into a legal estate." If anything is settled in the law, both upon principle and authority, it is that in the absence of statutes to that end a decree in equity does not, *ex proprio vigore*, operate on the ownership of land or transfer the title.

Pomeroy states it to be a fundamental doctrine of Equity Jurisprudence that in the absence of statutes,—

"A decree of a court of equity, while declaring the equitable estate, interest, or right of the plaintiff to exist, did not operate by its own intrinsic force to vest the plaintiff

with the legal estate, interest or right to which he was pronounced entitled; it was not itself a legal title, nor could it directly or indirectly transfer the title from the defendant to the plaintiff."

1 Pomeroy's Equity, sec. 428; also 134, 135, 170.

3 *Ibid.*, sec. 1317.

At the last cited place, Pomeroy again declares it to be a "fundamental doctrine of equity" that "a decree was not of itself a legal title, nor did it transfer title to the plaintiff." He then shows how this doctrine has been abrogated by statutory legislation in many States, but that the decrees of the United States Courts are still governed by the ancient rule, and that "their decrees do not transfer title."

In *Hart v. Samson*, 110 U. S., on pp. 154, 155, this Court said:

"Generally, if not universally, equity jurisprudence is exercised *in personam*, and not *in rem*. * * * Upon a bill for the removal of a cloud upon title, as a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff."

A court of equity, it further declares,—

"Has no inherent power, by the mere force of its decree, to annul a deed or to establish a title."

But the Bent bill was a bill for partition or it was nothing, and in any possible aspect of it the above-quoted definition by the learned counsel of the scope of the bill, the nature of the title involved, and the relief sought is,

in our opinion, fatal to their whole case. Even if the suit had gone to final decree, it would not have passed the title or established a legal estate. This Court has expressly so decided in—

Gay v. Parpart, 106 U. S. 679.

That case involved the consideration of a decree of partition in the State of Illinois, made under the general chancery practice, and before the passage of any statute authorizing the court of chancery to investigate conflicting or controverted titles. There was a provision for partition at law, but the proceeding in chancery remained as if there were no statute. The decision is precisely applicable to the state of the law as it existed in New Mexico when the proceeding in question was had. The Court said :

“ The proceeding which we are now to consider declares itself on its face to be in chancery, and the Supreme Court of the State, in reference to this very decree, decides it to be so. *Wadhams v. Gay*, 73 Ill. 415. We take it for granted that the State of Illinois, in making this provision and in leaving the parties to proceed by bill in chancery, intended that such a proceeding should have the force and effect of a partition in the High Court of Chancery in England, and in the main conform to the established chancery practice. This system does not deal with or decide questions of controverted title. Its purpose is to make division among the parties before the Court of real estate in which they had interests or estates that were not in controversy as among themselves.

“ It is another principle of the chancery jurisdiction *in partition that a decree itself does not transfer or convey title* even after the allotment of the respective shares of each of the parties to the proceeding, but that the *legal title remains as it was before*.

“ In this respect a decree is unlike the writ of partition at the common law, which in such cases operates on the

title only by way of estoppel. In chancery, however, this difficulty is remedied by a decree that the parties shall make the necessary conveyances to each other, and they may be compelled to do so by attachment, imprisonment, and other powers of the Court over them in person.

"In many of the States of the Union, where the equity powers of the Courts have been aided by statutes to get rid of the difficulty compelling parties in person to execute conveyances, the Court is authorized to appoint a commissioner to execute the conveyances in the names of the parties. In other cases the statute declares that such a decree itself shall operate as a conveyance of the title.

"At the time that the decree was rendered in the Superior Court of Cook county, which we are considering, we are not aware that any statute existed which gave such effect to the decree of the chancery court in partition (pp. 689-690). * * * That decree, therefore, did no more than to make a division and allotment of the land, and had no effect upon the actual ownership, or upon the title of the parties" (p. 692).

Therefore the decree of 1865, if there was any jurisdiction to render it at all, had no other effect than to declare an equitable right in complainants to exist; did not and could not convert such equitable right into a legal estate, but, on the contrary, left the legal title where it was before.

Upon the equitable title alleged—a parol agreement for an interest in land—if it were capable of being established, no partition could be had, and there was no authority to render the interlocutory decree. A bill should have first been filed, and a decree obtained, for a specific performance of the agreement; and after that was done, and a co-tenancy thereby established, a partition might follow. Without it the action was premature.

Williams v. Wiggan, 53 Ill. 235, 236.

Unless the action was brought within some of the

recognized heads of equity jurisprudence, or under some special statutory authority, neither the title to the land, nor the right to title, could be determined or established in this way.

A court of equity had no power to decree it, either *in rem* or *in personam*. With the claim of title disputed, as it was here, and unconnected with any other question by reason of which the jurisdiction of equity could attach, the defendants had a constitutional right of trial by jury. The decree of the Court assuming to "establish" the title of the Bent heirs was, therefore, for this reason also, without jurisdiction.

Not only so: Beyond all this, even if the Court should adhere to the principle of its interlocutory decree, and render a final decree of partition upon the commissioners' report, there still remained the right of appeal from such final decree. On such appeal every decision, act and order of the District Court made in the cause would come before the appellate tribunals for review. And upon the record as now presented there cannot be the remotest doubt that the decree would have been instantly reversed, and the bill dismissed, because of the complete absence of title in the complainants, and of jurisdiction of equity to determine it.

The interest or claim of the Bents, therefore, was nothing more than a pending suit for the establishment of an alleged equity, founded upon an unexecuted parol agreement for an interest in land; either without any consideration, or upon an unlawful one. All they had to sell, under the most liberal view of their case, was a doubtful lawsuit. It was a pending and undetermined suit, without any reasonable prospect of ultimate success. But it was a litigation which contained within itself abundant promise of long continued trouble, vexation and expense

for both parties, whatever the final result might be, and was precisely the sort of case toward the compromise of which Courts look with favor.

Such was the claim about which negotiations for compromise now ensued, between Maxwell and the Bent party in the person of Alfred, acting for himself and his two sisters and their husbands. (Rec., p. 62.) They were represented in the litigation by able and eminent counsel. Merrill Ashurst, their leading attorney, was one of the foremost lawyers of his time in New Mexico, as is shown by the reports of cases decided in the Supreme Court. With him were associated Judge Houghton, who was twice a Judge of the Supreme Court of the Territory, and Judge Tompkins, also a prominent member of the New Mexico bar, and a frequent practitioner before the Supreme Court. In the first volume of the New Mexico reports it appears that out of 43 cases heard and decided by the Supreme Court from 1852 to 1869, Ashurst was counsel in 31, and Tompkins in 15; and that in 1859, Tompkins was Attorney-General of the Territory.

It appears in evidence that all the subsequent proceedings on the part of the complainants in this case were taken on the advice of their counsel.

What followed on this subject is best told by quoting from the statement of facts (Rec., p. 62):

"It was understood between Alfred Bent and Sheurick, with the consent of their wives and Mrs. Hicklin, that either Alfred Bent or Sheurick, or both of them, should act in the matter as agents to sell to Maxwell, if they could, their interests in the grant for the best price they could get, but never less than \$21,000, or what Beaubien's heirs got. Overtures for compromise were made by Alfred Bent, acting for himself and his co-complainants, his two sisters, and their husbands, in September or October, 1865, when he went to Maxwell's residence at Cimarron, to try and

make a sale of their interest. These were made with the approval of Judge Houghton, one of their counsel, whom Bent consulted about it, and who told Bent he had better settle for himself and the other heirs by compromise rather than to take the award of the Commissioners. Bent demanded \$21,000; Maxwell offered \$18,000. Bent returned to Taos, where his family resided, without having affected a definite agreement with Maxwell as to price. The Bents considered the sale as good as made, but Alfred Bent said to his co-complainants that they could get a few thousand more by being quiet a few days, insisting, however, on having as much as the Beaubien heirs got; they then expected to close the bargain in a few days; were ready to make the deeds as soon as the matter was settled, and the deeds had already been written out by Sheurich, husband of Teresina Bent."

But business moved slowly in those days, and before anything further was done in the matter, Alfred Bent died in December, 1865. He left surviving him his widow, Guadalupe Bent, who afterwards married George W. Thompson, and is known in this record as Guadalupe Thompson, and three minor children, Charles, Julian, and Alberto Silas. (Rec., p. 62.)

Beaubien had died pending the litigation, leaving six children, who inherited his interest, and were found by the decree of 1865 to be the owners of the undivided half of three-fourths of the grant. (Rec., pp. 59, 61, 62.)

"Beaubien had left six children; Maxwell married one of them, and purchased the interest of the other five for a consideration of not more than \$3,500 each, at the following dates: Juana and her husband, Joseph Clouthier, and Isadora and her husband, Frederick Muller, April 4, 1864; Eleanor and her husband, Vidal Trujillo, July 20, 1864; Petra and her husband, Jesus G. Abreu, February 1, 1867; Paul Beaubien, January 1, 1870. Muller and Clouthier were merchants, residing at Taos; Trujillo and Abreu were

farmers, stockraisers, and also had stores; all four of them, as well as Scheurich and Hicklin, the husbands of Alfred Bent's two sisters, were intelligent men, ranked among the best citizens in their community, and were considered men of wealth and influence. (Findings, Rec., p. 68.)

"At the April term, 1866, of the District Court for Taos county, and on the ninth day of that month, the death of Alfred Bent was suggested by counsel for complainants in the then pending suit, and, on their motion, his three infant children, Charles Bent, Julien Bent, and Alberto Silas Bent, were made parties complainant." (Findings, Rec., pp. 68 and 69.)

The complainants in this suit then were Estefana and Teresina, both adults and married, together with their husbands, Hicklin and Scheurich, and the three minor children of Alfred Bent, for whom, on April 11, 1866, their mother, Guadalupe Bent, was, on motion of solicitors for complainants, appointed guardian *ad litem* "with full power to execute deeds, or to carry into execution all sales of transfers made of their interest, etc., to Maxwell." (Rec., p. 69.)

"In the meantime the negotiations for compromise, which had been interrupted by the death of Alfred Bent, were resumed, the Bent heirs being now represented by Aloys Scheurich, husband of Teresina, one of the adult complainants, who acted in said negotiations on behalf of his wife, Estefana, and her husband, Hicklin, and Guadalupe Bent. A settlement with Maxwell was concluded by Aloys Scheurich, acting for his wife, Mrs. Hicklin, and her husband and Guadalupe Bent as guardian *ad litem* for Alfred's children, which was acceptable to said parties, by which Maxwell was to pay the sum of \$18,000 for the conveyance of the interest or claim of the Bent heirs. The compromise was advised by Merrill Ashurst, the leading counsel for the Bent heirs, the grounds of his advice not being stated. It was accepted and carried out by

the adult complainants, Teresina and Estefana and their husbands, Scheurich and Hicklin." (Findings, Rec., pp. 69, 70.)

The only difference between this settlement and the one offered and authorized by Alfred Bent was that the amount to be received was fixed at \$18,000, instead of \$21,000. But this difference was more apparent than real. The point with Alfred and his co-complainants at first had been that they must get as much as Beaubien's heirs; and it is evident that the sum of \$18,000 offered by Maxwell was afterwards accepted, on finding that Beaubien's heirs actually received less, each of them getting \$3,500 for one-sixteenth, while the Bent heirs were each to get \$6,000 for one-twelfth. If the Bents had been paid for their doubtful claim in the same proportion that the Beaubiens were for their undisputed interest, they would have received for their entire claim only \$14,000, instead of \$18,000. The settlement executed was therefore clearly within the lines contended for by Alfred in his lifetime. Let it be remembered, also, that the settlement was not sought by Maxwell, who proposed to fight the case to the end, but was made upon the solicitation of the Bent party, urged both before and after the death of Alfred.

This compromise was advised by Ashurst, the leading counsel for the Bents (Rec., p. 70), who knew better than any one else the impossibility of sustaining the decree of June, 1865, on appeal. It was accepted and carried out by the adult complainants, Teresina and Estefana, and their husbands, who on May 3d and 31st, 1866, executed deeds conveying to Maxwell their interests, each for \$6,000. (Rec., pp. 72-3.) And from that day to this, no complaint of imposition, unfairness or fraud has ever been made by them. On the same day, Guadalupe Bent, guardian *ad litem* for her three children, executed a simi-

lar deed to Maxwell, conveying their interests for \$6,000, with full covenants of warranty by the said Guadalupe. (Rec., pp. 70-72.) This deed recited the order of the Court on April 14, authorizing it.

At the September term, 1866, next ensuing, a decree was entered in the cause, which had evidently been prepared and signed for the April term, but for some reason had not been entered. (Rec., p. 73.) It recited that "a mutual agreement had been made between the parties to the cause, settling and determining the equities," and directed the conveyances to be made, which had actually been already done in May; thus being in effect, though not in words, a confirmation of those acts. This decree, however, was of far more importance in another particular. It recited that an "interlocutory decree was rendered at a former term of the Court in said case, decreeing one-fourth of the land to the complainants, and appointing commissioners to divide and set it apart;" that "said interlocutory decree was never carried into effect;" and it was therefore *ordered, adjudged, and decreed "that the said interlocutory decree above mentioned" be set aside;* and it ordered each party to pay its own costs.

Thus the Court, in the exercise of its undoubted power and control over all interlocutory orders and decrees during the pendency of the cause, extinguished the decree upon which our opponents rely for the evidence of absolute legal title in the heirs of Bent.

The compromise under which this was done is assailed in the bill of complaint in the case at bar, as having been procured by fraud, deception, threats, and imposition, practised by a man of great power and influence upon an ignorant and feeble woman. These charges are completely swept away by the proofs as stated in the findings of fact by the lower Court, which will be referred to hereafter.

This transaction, moreover, has been once under the consideration of this Honorable Court, in a case of which more will be said hereafter; and the view which the Court then took of it will be found to be the only one which can be taken in the light of the proofs now in the Record. The court said, in *Thompson v. Maxwell*, 95 U. S. 391 :

“The proofs show a case which supports the conclusions of the decree to the effect that the terms of compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent), were advantageous to the said infants, and were so considered and accepted by the Court in their behalf.”

As I have said before, the decree by which this compromise was carried into execution was twofold in its character. The original decree as signed is not preserved in the record, nor does the decree entered bear any date, other than the record of the day on which the entry was made. Therefore we do not know the date on which it was actually signed by the Judge, although the inherent probability is that it was signed about the close of the April term, but not entered until the September term. It is a matter of no importance, however, and I only allude to it as affording a probable explanation of the curious fact that the decree directs conveyances to be made by the Bent heirs—not only by the guardian of the minors, but also by the two adult parties—when this had, in fact, already been done according to the exact terms of the decree. It is argued that this direction, in so far as it affected the property of the minor children of Alfred Bent, was void, because the Court had no authority by statute to direct the conveyance of the estate of infants. Were such the law, however, for the

purpose of this case, it would be an entirely immaterial matter. Whether the conveyance, or the order directing it, was void or valid, does not affect the other and more important part of the decree of September, 1866, viz., that which vacated and set aside the interlocutory decree of 1865, which no Court has ever denied the power to do. The two things were separate and distinct, and might have been in two different decrees. In one part, this decree found that there had been a compromise, and it vacated the former decree. In another part, it undertook to make the terms of that compromise more effectual, by directing further acts of the parties themselves to carry it into execution. But the first could stand independent of the last. Upon the authorities I have already cited, there is no escape from the conclusion that the District Court had the power to vacate the interlocutory decree of June, 1865; and that the decree of September, 1865, was, to this extent at least, lawful and valid. The interlocutory decree was thereby extinguished, and to every legal intentment expunged, blotted out of existence, and made absolutely null and void; and with it fell all rights or claims of whatever nature that depended on its findings.

Suppose the decree of 1866 had gone no farther; what would have been the status of the case, and of the parties? Undoubtedly they would have been just where they were before the interlocutory decree of June, 1865, was made. The case would have stood for hearing again, upon pleading and proofs. If, in addition to vacating the former interlocutory decree, the Court had also entered a judgment dismissing the bill for want of title in the complainants, the claims of the Bent heirs, infants included, would have been totally extinguished, and the property in controversy would have thereby become vested in Maxwell just as completely as it could have been by conveyance.

No authority can be found to controvert the power and jurisdiction of the Court to do this. And this Court, in speaking of this very decree of September, 1866, has said :

“A decree for carrying out a settlement and compromise of a suit is certainly not of itself erroneous. When made by consent, it is presumed to be made in view of existing facts, and that these were in the knowledge of the parties. *In the absence of fraud in obtaining it, such a decree cannot be impeached.*”

Thompson v. Maxwell, 95 U. S. 400.

This, then, was the situation in September, 1866. The litigation was closed. Each party paid its own costs. Everybody acquiesced in the result. Estefana and Teresina and their husbands were satisfied. Guadalupe Bent married George W. Thompson not later than March, 1867, and went with her children to reside at Trinidad, Colorado. And it remains for me to explain how and why it is that the Courts are not being vexed with controversy over those dead and buried issues.

In April, 1870, Maxwell sold and conveyed the entire grant to The Maxwell Land Grant and Railway Company for a consideration of \$1,350,000. (Rec., p. 12; and in No. 90, pp. 20, 66, and 77.) Afterwards distinguished counsel from New York, who examined the title for the purchasers, for what no doubt seemed sufficient reasons to him, was not satisfied with the state of the record touching the one-twelfth interest purporting to have been conveyed by Guadalupe Bent, and he succeeded in convincing the parties interested of the desirability of employing him to clear up the doubts which he had excited. He conceived the theory that inasmuch as the decree of June, 1865, had been vacated by the decree of September, 1866, the Bent claim had been extinguished, and therefore Guadalupe Bent's conveyance did not convey anything.

It seemed to him an anomaly that there should be a conveyance without something to convey, and, in order that there might appear some excuse for the existence of Guadalupe's deed, he proposed to have the decree of 1866 reversed in so far as it set aside the former decree, and then to have a new decree carrying into effect the compromise agreement and quieting the title. For this purpose he filed a bill of review in August, 1870. In so doing he opened Pandora's box and let loose the winds of litigation, which have raged with fitful energy for twenty-seven years. Mr. Thompson, the enterprising husband of Guadalupe Bent, shrewdly concluded that if there was something in this matter requiring the Maxwell party to go into Court for, that something must be worth fighting. So he employed counsel and entered upon a vigorous defense. They interposed a demurrer, and when this was overruled answered the bill, setting up that the conveyance by Guadalupe and other proceedings in 1866 were illegal and void, and did not divest the title of the infants. (Rec. in No. 90, p. 39.)

It is a remarkable and significant fact, however, that in the answers that were then made by Guadalupe Thompson and her husband, at the time when the whole transaction was fresh in their memory, there is not a single suggestion of any imposition or fraud in the compromise agreement, or decree, although the invalidity of the decree, and the proceedings connected therewith, as affecting the right or title of the infants, was distinctly and repeatedly alleged.

The case in this form proceeded to a decree by the District Court, which found that—

“Pending the original suit, and after the death of Alfred Bent, an agreement by way of compromise was

made by the adult parties thereto, for the settlement of the same; and that the terms of said compromise and agreement were considered advantageous to the said infants, and were accepted by the Court for and on their behalf, as is evidenced by the decree attempting to carry into full effect the terms of said compromise." And that "By reason of said agreement and compromise all the equitable right, title, interest, and claim of the said infants in and to the premises in question became and was wholly terminated and extinguished."

It therefore ordered and decreed that the decree of 1866 should be vacated and set aside, and—

"That the said premises be and they are now held and possessed by The Maxwell Land Grant and Railway Company, free and discharged of any and all trusts, right, title or interest in or to the same, in favor of or pertaining to the said Guadalupe Thompson, either in her own right or as administratrix of the estate of said Alfred Bent, the said George Thompson, her husband, the said Charles Bent, Alberto Silas Bent, and Julien Bent, or any or either of them." (Rec. in No. 90, p. 52.)

This decree was affirmed by the Supreme Court of New Mexico :

Thompson v. Maxwell, 1 N. M. 603.

It was reversed by this Honorable Court :

Thompson v. Maxwell, 95 U. S. 391.

But upon an examination of the opinion in the latter case it will be perceived that although the decision therein was in form a reversal, nevertheless such reversal was made upon a technical matter of pleading, while upon the merits of the case it fully sustained the conclusions of the Court below. The trouble which the Court found with the case was that upon the established principles of

equity pleading the bill could not be sustained as a bill of review. But it held that if the bill had been stripped of the allegations and prayers which made it a bill of review, and had been limited to its apparent purpose of carrying into effect the compromise agreement and quieting the title, it would have been free from legal objection. It also held that while it was not established that the compromise on which the decree of September, 1866, was founded was made by Alfred Bent in his lifetime, yet negotiations to that end were commenced by Alfred Bent, and concluded after his death by the other parties to the suit. And it concluded thus :

"The proofs show a case which supports the conclusions of the decree, to the effect that the terms of compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants, and were so considered and accepted by the Court in their behalf." (P. 400.)

But although the Court found it necessary to remand the case for further proceedings, in conformity with its opinion, it did not think proper that the case should be litigated over again; and it therefore directed that the complainants have leave to amend their bill, with liberty to the defendants to answer any new matter introduced therein, and that all the proofs should stand as proofs upon a future hearing, with liberty to either party to take additional proofs upon any new matter put in issue by the amended pleadings.

This direction furnished a clear and infallible guide to all Courts below as to the subsequent conduct of the case, and nothing can be more certain than that this Court decided that the complainants were entitled to the relief they were evidently in search of, if they would simply frame their bill in accordance with the intimations of its opinion.

The complainants accordingly amended their bill by elimination instead of addition, so that it is no longer a bill of review, but a bill to quiet title ; and the allegation of the compromise agreement is made more general by striking out the statement that it was made in the lifetime of Alfred Bent.

Upon these amendments being made, the defendants insisted that they had a right to interpose a new and original defense to the whole bill, by setting up fraud in the procurement of the decree of September, 1866, and the compromise on which it was founded. Upon exceptions being filed to their answer, the District Court directed all of this new matter which was not strictly responsive to the new allegations of the amended bill to be stricken out. The case again proceeded to a hearing and decree, in accordance with the prayer of the bill. That decree was reversed by the Supreme Court of New Mexico, on the ground that the District Court erred in sustaining the exceptions to the new matter in defendants' answer ; and the case was remanded with directions to restore those portions of the answer which had been stricken out.

Thompson v. Maxwell, 3 N. M. (Gild.) 448.

This was accordingly done. Issue was joined, and a large amount of proof taken by defendants in the attempt to sustain their allegations of fraud and imposition. This was met by additional proofs on the part of the complainants, and upon this record this case went to final hearing, resulting in a third decree in favor of complainants, which, after being affirmed by the Territorial Supreme Court, is now appealed from, as Case No. 90, now standing for hearing along with this.

In the meantime, after that case was remanded by this Court, an original bill was filed in behalf of the Bent children, not only against the complainants in the then pending suit, but also against The Maxwell Land Grant Company, which had meantime acquired the property by purchase, to impeach the decree of September, 1866, for fraud, upon the same grounds alleged in the new answer in the original suit; praying that it be set aside, and that the decree of June, 1865, be re-established and carried into effect. This bill also attacked the decree of September, 1866, for error, in that the District Court had not the power to direct the disposal of the infants' real estate, and prayed in the language of a bill of review that it be reversed and held for naught.

To this bill a demurrer was interposed, which was sustained, and the bill dismissed. But upon appeal that decision was reversed by the Supreme Court of New Mexico, upon the ground that the fraud charged in the bill, which was admitted by the demurrer, was sufficient to sustain an action to impeach the decree of 1866.

Bent v. Maxwell, 3 N. M. (Gild.) 227.

The new case upon the original bill of the Bent children being thus remanded, the defendants answered the bill, and the parties proceeded to take proofs in order; and the two cases have since proceeded side by side. By stipulation, all the proofs in either case were to stand as proofs in both. (Rec., p. 41.) Upon final hearing this new bill of the Bent heirs was dismissed, and from the affirmance of that judgment by the Territorial Supreme Court the case is brought here by appeal. Thus we have now two cases for hearing together, viz: No. 90, in which the Maxwell people are complainants, and No. 91, in which the Bent people are complainants. Both involve almost

the same questions, and depend upon the same findings of facts by the Supreme Court of New Mexico. A decision in favor of complainants in No. 90 necessarily resulted in the dismissal of the bill in No. 91. Therefore, the argument in No. 91 is applicable equally to No. 90 for the most part, and *vice versa*.

ARGUMENT AGAINST THE RIGHT TO REVERSE OR IMPEACH THE DECREE OF SEPTEMBER, 1866.

The object of the bill in this case is to have the decree in the May term, 1865, purporting to establish the right of the Bent heirs to one-fourth of the grant, and directing partition thereof, enforced and carried into execution (Prayer of bill, Rec. 14). As this is impossible so long as the decree of September, 1866, vacating the former interlocutory decree, stands, the bill necessarily undertakes to get rid of that decree. Unless this can be done, complainants' whole case falls to the ground at the outset; but even if it were done, their case would fail just as completely for other reasons.

The attack upon the decree of 1866 is upon two grounds, viz. :

I. That it was erroneous, because entered by consent, and because the District Court was without jurisdiction to direct the disposal of infants' real estate.

II. That it was procured by fraud.

Under the first of these propositions, the attempt is to reverse and annul the decree for error, upon the allegations and prayers of a bill of review (Rec., pp. 10, 15); under the second, to impeach it for fraud. In view of the facts now shown in the record by the findings of the Court below, we contend that the case is *res adjudicata*.

I.

The Case is Res Adjudicata.

When the case of *Thompson v. Maxwell* was before this Court, in 95 U. S., the Court had before it on the record the same proceedings of the District Court of Taos County in 1866 that are attacked now, viz. :

1. The order appointing Guadalupe Bent guardian *ad litem*, with authority to execute the conveyance to Maxwell.
2. Her deed, executed upon the authority of that order.
3. The decree of September, 1866.

This Court also found, as a fact established by the proofs, that :

4. The foregoing proceedings were had in pursuance of an agreement for compromise, the negotiations for which were commenced by Alfred Bent in his lifetime, and concluded after his death by Scheurick, and acquiesced in by the other parties, including the widow of Alfred Bent, acting in behalf of her children.

Which fact remains unchanged in the present record.

The validity of the compromise, the decree, and the deed, as affecting the title of the minors, was distinctly put in issue by the pleadings. Had they been invalid, the title of the infants, whatever it might be, would not have been divested, but would have remained as it was before those proceedings were had. This Court, upon that aspect of the case, must necessarily have denied the relief sought in any form, and dismissed the bill.

By not dismissing the bill, by holding that the decree could not be impeached except for fraud, and that the

proofs show a case which supported the conclusions of the decree then appealed from, and by remanding the case simply for an amendment of the pleadings, this Court has passed upon the rights of the parties growing out of those proceedings, and their status has been fixed as the law of this case. Those questions are all antecedent to the mandate, are concluded by it, and are not re-examinable.

It is settled by repeated adjudications of this Court that—

“Whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit.”

Roberts v. Cooper, 20 How. 481.

Supervisors v. Kennicott, 94 U. S. 498.

United States v. Pacific Mail Co., 104 U. S. 480.

Clark v. Keith, 106 U. S. 464.

Chaffin v. Taylor, 116 U. S. 572.

See also—

Stockton v. Ford, 18 How. 418;

Nashville Ry. Co. v. United States, 113 U. S. 261,

which present examples of attempts to relitigate in a second suit questions previously decided in a former suit, and where the Court held that the question was properly involved in the former case, and might have been there raised and determined, and could not be brought in issue again.

In the case of *Southern Pacific R.R. Co. v. United States*, decided by this Court at the present term—No. 71—the Court, upon an exhaustive review of the authorities, has said that as a general principle—

"A right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies."

The only new element introduced into the case since the decision in 95 U. S. is that of fraud. The case upon the present record will otherwise present the same state of facts as then, viz.: a consent decree, carrying out a compromise begun by Alfred Bent, and concluded after his death by the other adult complainants and Guadalupe Bent, as guardian of his children. Upon that state of facts, and with this identical decree before it for consideration, this Court held upon the former decision of the other branch of this case in 95 U. S., that this decree cannot be set aside on a bill of review. And on page 398, as if to anticipate and settle in advance the question raised by this bill, the Court goes on further to say, speaking of this identical decree:

"A decree for carrying out a settlement and compromise of a suit is certainly not, of itself, erroneous. When made by consent, it is presumed to be made in view of the existing facts, and that these were within the knowledge of the parties. In the absence of fraud in obtaining it, such a decree cannot be impeached."

It is, therefore, the *law of this case*, and no longer open to controversy or discussion, that the cause of action stated by this bill is insufficient, except on the single ground of fraud.

Hence, everything under the first head is eliminated by the previous decision of this Court.

Everything under the second is eliminated by the statement of facts by the Court below, which declares as the result of all the evidence in the case that—

"No fraud, imposition, or error has been shown to have entered into said transaction, or to have brought about said compromise decree." (Rec., p. 76.)

It is, therefore, as if the bill had been framed without any allegation of fraud ; which would have left it a bill of review, pure and simple, to reverse for error a decree which this Court has said cannot be impeached, except for fraud.

If this is not conclusive of every question raised by the present bill, we are unable to conceive how anything could be. In discussing the propositions of our opponents further, I do so believing that the questions proposed are not within the record. It is only from a sense of the duty of counsel to leave nothing undone which might by any possibility tend to the benefit of those whom he represents, and for the further reason that any argument advanced by counsel so learned and distinguished is worthy of respectful consideration, that I venture to discuss them at all.

II.

There was no Error in the Decree of 1866.

The principal allegation of error relied upon to reverse the decree of 1866 is founded upon the proposition that the courts of chancery, in the absence of statutes authorizing it, have no power to order a sale of infants' legal estate in lands, for maintenance, education, or investment. This is laid down in 3 Pomeroy's Equity, sec. 1309, as a rule upon which the authorities are far from uniform ; and he cites in a note the following cases to the contrary of the doctrine stated in the text :

Goodman v. Winter, 65 Ala. 434.

Sharp v. Findley, 59 Ga. 722.

Bulow v. White, 3 South Car. 371.

Huger v. Huger, 3 Dessauere (S. C.), 18.

To which may be added the following later cases :

Thorington v. Thorington, 82 Ala. 489.

Gassenheimer v. Gassenheimer, 108 Ala. 651.

In *Perry on Trusts*, sec. 610, it is said to be "a matter of doubt and much conflict of opinion."

See also—

In re Salisbury, 3 Johns. Chy. 348.

Hedge v. Rickers, 5 Johns. Chy. 167.

Bulow v. Buckner, Rich. Eq. Cas. (S. C.) 401.

Downing v. Sprecher, 35 Md. 474.

Stapleton v. Vanderbilt, 3 Dessauere (S. C.) 22.

Kearn v. Venja, 50 Mo: 410, 434.

But taking it as stated, the rule is distinctly limited to sales of *legal estates* of infants, for purposes of maintenance, etc., in a direct proceeding for that purpose.

It does not apply to equitable estates.

Wood v. Mather, 38 Barb. 473.

Cochran v. Van Surley, 20 Wend. 376.

Mills v. Dennis, 3 Johns. Chy. 367.

Anderson v. Mather, 44 N. Y. 260.

Nor to cases where the infants are parties litigant, and their interests are before the Court in adversary proceedings.

Corker v. Jones, 110 U. S. 317,—a case entirely in point.

In the last cited case, where the infant was plaintiff, and the Court had decreed that certain land purchased by defendant as guardian should be held by him individually,

and the interest of the ward divested, it was urged that the court of chancery was without power to render such decree, upon the same grounds insisted on here. The Court said :

" The question is not one relating to the sale or disposition of any part of the ward's estate which had come under the control of the guardian, but was whether, under the circumstances, the purchase made by the guardian should be treated as made for the benefit of his ward, or whether its burdens and risk should be borne by him individually. It was peculiarly a case for cognizance in equity, and the Superior Court of Burk county, we think, had jurisdiction to make the decree directing the title to remain in Malcolm D. Jones for his own use.

" It is further urged, however, that the decree is voidable because it was taken against an infant, without the protection of a *guardian ad litem*. If the infant had been defendant, the objection could only be taken on appeal, or by bill of review, and not collaterally ; but the infant was plaintiff, and sued by his next friend, which was proper, and there is no more ground for saying that the decree was against the infant than in his favor."

The distinction is evident, upon a moment's reflection. For the jurisdiction of chancery courts to decree transfers of infants' estates is constantly exercised in such matters as suits for specific performance of contracts of the ancestor, and in partition of real estate. They are among the best known heads of equity jurisdiction.

In partition, the jurisdiction has existed in courts of chancery from the earliest times, to effect transfers of real estate of infants, whether plaintiffs or defendants. It extends to a sale of the property as well as to a division.

Freeman on Cot. & Par., secs. 457, 467.

Brook v. Hertford, 2 P. Wms. 518.

Hooke v. Hooke, 6 La. 474.

Coker v. Pitts, 37 Ala. 693.

This is emphasized by Pomeroy in the most positive terms :

“ By the original equitable jurisdiction, independent of any statute, if all the parties *sui juris* were willing, the Court had power to decree a sale, and this even though infants might be among the parties interested.”

3 Pom. Eq., sec. 1390 ; citing :

Davis v. Turney, 32 Beav. 554.

Hubbard v. Hubbard, 3 Hem. & M. 38.

Thackery v. Parker, 1 N. R. 567.

Rivers v. Duer, 46 Ala. 418.

Goodman v. Winter, 64 Ala. 410.

The fallacy of the entire agreement of appellants as to the effect of the decree of 1866 lies in their attempt to treat it as if made in a direct proceeding for the disposal of the real estate of infants. If this were the case, many of the authorities cited by them would be applicable, because it is not contended by us that the landed estate of infants can be disposed of this way upon consent alone.

But consent will not of itself vitiate a proceeding by a Court of competent jurisdiction simply because the interests of infants are in part involved, if the transaction appears free from collusion or fraud ; especially where there are other parties *sui juris*, and kinsmen with identical interests as well, whose interests are dealt with on the same terms. Still less do these objections apply to a proceeding which was not in any sense one for the disposal of the estate of infants, but a compromise of a litigation, made with the sanction of the Court.

That the claim of the Bent heirs, whether before or after the interlocutory decree of 1865, if it was anything at all, was nothing but a mere equity, has been sufficiently demonstrated by discussion of its character in the intro-

ductory part of this brief. This Court, in 95 U. S., called it an equitable claim ; and the District Court, for want of the necessary statutory power, could not, by any decree alone, change it into a legal estate. Still less could it do so by a decree which was not final, but was still subject to review upon appeal.

The importance of the proposition of our opponents now under consideration lies in the fact that if true, it destroys the efficacy of the deed of Guadalupe Bent, conveying one-twelfth interest in the grant to Maxwell. If that conveyance was of a legal estate, and depended for its authority solely upon the direction of the District Court, and the District Court was without power to direct it, then, as a matter of course, the deed would convey no title. But if it should appear that the interest of the children of Alfred Bent—after the decree of June, 1865, and giving to it all the force claimed by counsel—was nevertheless only a trust estate and not a legal title, and that Guadalupe Bent was from another source invested with ample authority to sell and convey it, either in her discretion or by the direction of the District Court, then, of course, the question of the power of the District Court to decree a conveyance of their legal estate is no longer material. Such is the case now.

Will of Alfred Bent.

The conveyance in question is found on page 70 of the Record. It recites the appointment of Guadalupe Bent as guardian *ad litem* of the minor heirs of Alfred Bent. It is signed, "Guadalupe Bent, *nee* Long, guardian *ad litem* of Charles Bent, Julian Bent, and Alberto Silas Bent," and is acknowledged by her personally. It recites the payment to her by Maxwell of \$6,000, and acknowledges

the receipt thereof, and then grants, bargains, sells, conveys, and confirms to Maxwell "the following described real estate, situate," etc. (here follows a description of the whole grant), "to have and hold the one undivided one-twelfth interest of, in, and to the above described real estate," etc., "the said one-twelfth undivided interest being the entire interest, estate, claim, and demand of the said Charles, Julian, and Alberto Silas Bent, the said minor heirs of their father, Alfred Bent." Then follows an absolute covenant of warranty that the above-described interest is free and clear of encumbrances, and that "*I, my heirs, executors, and administrators shall and will warrant and defend the title to the same unto the said Lucien B. Maxwell, his heirs and assigns, against the lawful claims or demands of all persons whomsoever.*"

It is the law that where a deed with covenants of warranty is executed by a person as executor, or in other similar capacity, the word "executor" may be taken as only *descriptio personae*, and the deed will be good if such party has power in his own right to make it.

Norris v. Harris, 15 Calif. 255.

Taylor v. Davis, 110 U. S. 336.

And where there are full covenants of warranty, such as there are here, the deed will convey all the title which the grantor had in her own right, whether then existing or afterwards acquired, notwithstanding she assumed to convey in a fiduciary capacity.

Rawle on Covenants, secs. 35, 36, 247.

17 Am. Dec. 224, note.

Heard v. Hall, 16 Pick. 460.

Foster v. Young, 35 Iowa, 32.

The last case is precisely in point, and on all fours with this one; and it was held, after a review of the authorities,

to be the law beyond question, that a deed by a guardian, purporting to convey real estate belonging to his ward, if made with covenants of warranty, binds the guardian as to any individual interest he may have and possess in the title thereto.

The application of the foregoing is this :

After the original case had been remanded to the Territorial Courts, and this new suit had been commenced, the defendants put in evidence the will of Alfred Bent, presented to the Probate Court April 12, 1866, by Guadalupe Bent herself, and duly proved, admitted to probate and recorded, as shown by the records of the Probate Court of Taos county, by which Alfred Bent *gave to the said Guadalupe*, for the maintenance of herself and his three children, *all his real and personal property*, and appointed her as his executrix.) (Rec., p. 65.)

The introduction of this document carried consternation into the camp of our learned adversaries. Proceedings in the main litigation were suspended until they had exhausted every means—even to the extent of an appeal to this Court—in the effort to get rid of it.

They first attacked the probate of the will, and procured a judgment of the Probate Court of Taos county setting aside the probate made in 1867, and declaring it not the will of Alfred Bent.

The District Court reversed the action of the Probate Court, and declared the will and the probate thereof to be valid and effectual. Our opponents appealed to the Supreme Court of the Territory without avail ; and then to this Court, where they were again defeated, and the will of Alfred Bent was established as a muniment of title forever.

Bent v. Thompson, 5 N. M. 508.

Ibid., 138 U. S. 114.

That this will invested Mrs. Bent with the legal title to the real estate, subject to a trust, there can be no doubt. The cardinal rule in the interpretation and construction of wills is, that the intention of the testator is to govern, if it can be ascertained from the instrument. Here was no attempt by Alfred Bent to disinherit his children; but on the contrary the intention to provide for their maintenance is distinctly expressed. For the purpose of carrying this into effect, the property is given to the widow, subject to a trust for the maintenance of the children along with herself. This trust necessarily implies the power of disposition in the trustee to make it effectual. The testator clearly conferred this power when he gave the property to *her*, instead of to her and the children. It was such a trust as a court of equity would enforce, supervise or control, upon a showing that the widow was not administering it properly or in good faith. For the purpose of maintaining herself or the children, she could alienate the property, either directly or by the order of the court of chancery. One thing is certain: the fee was *not* in the children. The best that can be said for them is, that they were *cestuis qui trust* as to the portion they would have inherited in the absence of a will.

The case of *Dunscomb v. Holst*, 13 Feb. Rep. 11, cited by counsel, and also those referred to in the opinion in that case, are all different from this. In those cases the gift was "for the use," or "use and support" of the widow and children. In the case reported, the decision of the Court simply was that under such a will the title acquired by the widow was not of such clear and undisputable character as a purchaser at a Master's sale had a right to demand.

In *Bowers v. Bowers*, 4 Heisk. 293, cited in 13 Fed. Rep. 13, the Court held under a similar will that—

"The legal title was vested in the daughter (devisee), but she was to hold it as trustee for the joint use and benefit of herself and her children. The daughter, therefore, had the *legal title* to the whole property, and an equal equitable interest therein with each of her children."

In some of the other cases cited from Tennessee it was held that the words of the will created a life-estate only in the devisee. There is a technical force to the word "use," which gave rise to the construction of the will in the latter class of cases.

In our case, however, the word "use" is not employed, but "maintenance" is. And this word implies the power to employ the property for such purpose—to produce something wherewith to maintain. It therefore necessarily implies the power to convert land into money.

In *Woods v. Woods*, 1 Myl. and Craig, 401, it was held by the English Court of Chancery that "where a man willed his property to his wife toward the support of herself and her family" she took the property subject to a trust for the family.

In *Crockett v. Crockett*, 2 Phill. 533, the will said :

"All the property shall be at the disposal of my wife for herself and children;" and the Chancellor, Lord Cottenham, held that as between her and the children the widow "was either a trustee of the fund, with a large discretion as to the application of it, or she had a power in favor of the children subject to a life interest in herself."

In *McGowan v. McGowan*, 2 Duer (N. Y.), 57, the language of the will was :

"I give and bequeath to my wife Anne all my real and personal estate whatsoever * * * for her own behoof, and the maintenance of my children, etc. * * * and at my son J.'s becoming of age the whole estate to be

divided equally among my children." (Naming seven in all.) Held under this: "The widow in this case took the whole estate subject to the maintenance and education of the children as a charge, which a court of equity might enforce."

And it was further held that there was no suspense of the power of alienation, except by the provision in the will that the property should be divided between the children on J.'s attaining his majority, which it was held suspended such power during the minority of the youngest child.

Even under the authority of *Bowers v. Bowers*, *supra*, cited in 13 Fed. Rep. 13, it was distinctly held by the Supreme Court of Tennessee that the *legal title vested in the devisee*, and an equitable interest vested in the children.

In *Pratt v. Miller*, 23 Neb. 496, where the property was given by will to the testator's wife "for the maintenance and support of my said wife and my infant child, C. D. P." It was held that the will gave the legal title to the widow upon trust, and that the child was the equitable owner, and on the death of the widow entitled to a conveyance of the legal title to him.

In *O'Reilly v. McKiernan*, 90 Ky. 116, the will gave the property to the wife, "to be administered by her for the support of herself and my children;" and the Court held that under it—

"The legal estate or title is in the wife; at the same time it must be regarded as being held in trust for the benefit of herself and children," and that "the aid of the Chancellor must be invoked if a sale is required."

See also, generally :

Perry on Trusts, sec. 117.

Now if, as these authorities seem to establish, the widow under Alfred Bent's will took the legal estate in the property, subject to a trust in favor of his three children, then the interest of the said children was precisely the sort of interest over which courts of chancery have *always* had jurisdiction in case of infants, viz., *their trust estates*.

This is clearly set forth in a learned opinion by the Supreme Court of New York, in the case of *Woods v. Mather*, 38 Barb. 473.

That case was decided in 1862. The Court approves the decision of Chancellor Kent in *Mills v. Dennis*, 3 Johns. Chy. 367, that—

“Courts of equity still have the power which they have long exercised, of changing the estates of infants from real into personal and from personal to real, whenever they deem such a proceeding most beneficial to the infant.”

And the Court further proceeds :

“The court of chancery had inherent jurisdiction, independent of statutes, to order a sale of the equitable interests of infant plaintiffs. It is a settled principle that whenever the property of infants consists of real or personal estate, the title to which is in trustees, the Chancellor, as the general guardian and protector of the rights of infants, may authorize such a disposition thereof as he, in the exercise of a sound legal discretion, may deem most beneficial to such infant.” (P. 482.)

After alluding to the New York statutes on the subject, the Court proceeds further :

“The statutes above referred to give the court of chancery power over infants' legal estate only. But the power is ample, and it would be a remarkable anomaly,

if the Court had not also a jurisdiction at least equally extensive in respect to infants' equitable estates, which by their very nature are under its peculiar and exclusive care. There are remarks to be found in some of the reports to the effect that the power of the Court is derived wholly from statutes ; but so far as I have observed they occur in cases involving sales of legal estates, and should be understood as referring to such estates only. This question and some others discussed in this case have been set at rest by an unreported decision of the Court of Appeals."

The Court then gives the history of the case of *Pitcher v. Carter*, 4 Sandf. 1, in which the same doctrine was maintained, and the case finally affirmed by the Court of Appeals, and concludes :

"It seems clear, therefore, upon principle and authority, that the court of chancery has power to order a sale of the equitable interests of the infant plaintiffs in question."

In *Anderson v. Mather*, 44 N. Y. 260, the doctrine of the foregoing case was affirmed, and the Court of Appeals declared that—

"The power exercised by the court of chancery as to the sale of the estate of infants of an equitable nature, is inherent, and not derived from statutory authority. * * * The authority to sell the estate of infants, of an equitable character, independently of any statutory power, has been exercised by the court of chancery in several instances in this State. * * * The exercise of the power in question has been long in use, has been advantageous, and ought now to be doubted."

Therefore, if Alfred Bent had any estate, legal or equitable, in this property, by reason of the decree of 1865 or otherwise, he made such a disposition of it by his will that the interest which his minor children took was only

equitable, and was either subject to disposal by the widow as trustee independently, or by the direction of the court of chancery under its general power over the trust estate of infants. If the authority was otherwise lacking in the District Court to direct the conveyance by Guadalupe Bent, such authority is supplied by the will, either to her alone or to the Court, or to both.

But if, *pro argumento*, we grant the proposition in its entirety, that the District Court had not the power to direct the conveyance, it will avail complainants nothing in this case. There still remains the other proposition already established by overwhelming authority, and which no Court has ever denied, that the Court had the power to set aside its own interlocutory decree. No Court would now annul the entire decree merely because one part of it was erroneous ; the valid part would remain in any event. But every Court would presume that the District Court in 1866 vacated its former interlocutory decree in the exercise of its undoubted power, and for sufficient reasons ; and such reasons are plainly apparent in the record. The whole proceeding touching the conveyance by the Bent heirs may be treated as surplusage, and as not affecting the rights of the parties, one way or the other. The Court might properly have dismissed the bill in the partition suit for want of equity, and reached the same practical result. Hence, even if the conveyance by Guadalupe was void, still the decree of June, 1865, is extinguished, and the original suit stands abandoned by all parties, though not formally terminated. It would therefore remain for the Court *now* to say, upon the original bill of 1859, and the sworn answers to it, whether it will not consider that bill as dismissed for want of title in the

Bents, and quiet the title accordingly. The ultimate object sought by the present bill is to re-establish the decree of 1865. Before this can be done, complainants are bound to show that the decree, upon the pleadings in the record, was a proper one. It is useless to invoke presumptions to help it, for these will equally attach to the decree by which it was extinguished. If it appears by the statements of their own original bill of 1859, that Charles Bent never had any title to an undivided interest in the grant, that is an end of the matter.

Upon the other allegations of the bill imputing error to the decree of 1866, little need be said.

The contention that the decree of 1866 was void because it failed to give the infants a day to show cause against it, or that they have a right to treat it as voidable for error upon their application on coming of age, is as little supported by authority as their contention that the interlocutory order of 1865 is a final decree.

These infants were *complainants* in the case, who were not brought in by any act of the defendants, but as the successors of their father, who had voluntarily gone into Court. The compromise was brought about by the procurement of the complainants, and not of Maxwell. It is settled on abundant authority that an infant complainant has no day in Court after decree to attack it, and is as much bound as a plaintiff of full age, unless for fraud such as would enable any other party to attack it.

1 Dan. Chy. (5th Ed.) 73.

Gregory v. Molesworth, 3 Atk. 626.

Brooks v. Hertford, 2 P. Wms. 578.

10 Am. & Eng. Encyl. 696, and cases cited.

This Court, in a recent case, has affirmed this rule,

upon the foregoing English authorities, which it quoted with approval, as follows :

“ In *Gregory v. Molesworth*, 3 Atk. 626, Lord Hardwicke said that—

“ ‘ It is right to follow the rule of law, where it is held an infant is as much bound by a judgment in his own action as if of full age ; and this is general unless gross laches, fraud, or collusion appear in the *prochein amy* ; then the infant might open it by a new bill.’ So in *Brooks v. Hertford*, 2 P. Wms. : ‘ An infant when plaintiff is as much bound and as little privileged as one of full age.’ ”

Kingsbury v. Buckner, 134 U. S. 650.

In the last edition of Freeman on Judgments, vol. 2, p. 513, the modern doctrine is stated to go much further, as follows :

“ But the better opinion is that an infant defendant is as much bound by a decree in equity as a person of full age. Therefore, if an absolute decree be made against a defendant under age, he will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it.” Citing—

Ralston v. Lahee, 8 Iowa, 23.

Joyce v. McAvoy, 31 Calif. 273.

III.

The Transaction was Free From Fraud or Wrong of Any Kind.

As to the remaining ground of attack upon the decree of September, 1866, and the compromise settlement by Guadalupe Bent, viz.: fraud in their procurement, it is completely disposed of by the findings of fact by the lower Court. (Rec., pp. 75-76.) Charges of fraud are easily made, but too often amount to mere clamor, and are employed, as this Court said in *Marquez v. Frisbie*, 101 U. S. 478, simply to "stigmatize acts which are adverse to the plaintiff's view of his own right." So when this record is examined it will be found that the Bent case, like many others, is rich enough in allegation, but wholly barren in proof. True, they have proved that the Maxwell grant is a valuable property, and that Maxwell was a man of unusual force of character, and great influence among men—neither of which were ever disputed. They have also established the fact that Mrs. Bent was an "ignorant Mexican woman,"—ignorant enough to tell the truth about this transaction, and to show that as to all its substantial features she perfectly comprehended the nature of her act, and intended that it should have the effect which it is understood to have by everybody except Mr. Thompson and his learned counsel. They do *not* show that Maxwell made use of his power, wealth, or influence to obtain any advantage in the transaction or for any purpose, except to announce his intention of defending his title and possession so long as there was a Court to appeal to.

The finding of facts by the lower Court, upon this point, is as follows :

"It is proven on the part of the complainants that the said Guadalupe Bent is a Mexican woman, and at the time of her said appointment as guardian *ad litem* to the infant complainants, and at the time of the execution of her deed of May 3, 1866, was ignorant of the English language, unable to read, write, or speak the same; was unfamiliar with business or with her duties as guardian *ad litem*; was without knowledge of the boundaries or extent of said lands, or the character or value thereof, or of the Act of Congress confirming the said grant, or of the particulars of the decree of June 3, 1865; that Maxwell represented to Scheurich that the grant was not as large as it was supposed to be; that it did not extend into Colorado or beyond the Red River, whereas it did so extend over 200,000 acres; that said Scheurich and Guadalupe Bent believed and were influenced by said representations; that the said Maxwell, while generous and magnanimous in many respects, was unscrupulous and tyrannical as well, and was a resolute and determined man, and was at that time a man of large wealth and great power and influence throughout the county of Taos and Territory of New Mexico, as was known to said Guadalupe Bent, and he exercised such power and influence in such way that the weak feared to oppose him in matters of personal concern; that said Guadalupe Bent was in part influenced in executing said conveyance by this known character of Maxwell; that Maxwell made threats that unless the Bent heirs accepted the sum of \$18,000 for their claims they would never get anything, and that no one should occupy any part of his land, and that such threats were communicated to said Guadalupe, and that this and Maxwell's known character influenced her in making the conveyance to Maxwell; that the said conveyance was written in the English language, and was not read over to the said Guadalupe or interpreted to her.

"But it appears to be the fact that means of knowledge of the extent, character, and value of the said grant was open to the Bent heirs and to their counsel. It was not definitely known at the time where there the boundary line between Colorado and New Mexico was. Guadalupe

Bent acted in concert with the adult complainants in the suit, dealing with their own interests on the same terms as those she represented, and she was willing to make the same settlement they did. Both Scheurich and the counsel for the Bent heirs were conversant with both the English and Spanish languages, and could read and write the same.

"It appears by Guadalupe Bent's own testimony, and the Court accordingly finds, that when she executed the conveyance to Maxwell she understood there had been a settlement with Maxwell by which the interests of the Bent heirs were to be transferred to Maxwell for the sum of \$18,000; that she understood the document she signed was a transfer of the interest in the Maxwell grant which had belonged to her husband, Alfred Bent; that the settlement for \$18,000 was satisfactory to her; that she supposed the document she signed was one which Scheurich had arranged with Maxwell; that she had relied on said Scheurich for advice, and was willing to accept and do whatever he thought best in the matter; that she believed she had authority to sign the deed and to convey the interest in the said grant which her former husband, Alfred Bent, had claimed or owned, and it was her intention by the said deed to convey to Maxwell whatever interest in said grant had belonged to said Alfred Bent in his lifetime and was left by him at his decease. *And the Court finds that no fraud, imposition, or error has been shown to have entered into said transaction or to have brought about said compromise decree.*" (Rec., pp. 75-76.)

The truth is, the record and proofs in this case show that if there ever was a disputed transaction that proved to be free from every element of imposition, concealment, misrepresentation, or fraud, this was such a transaction. It was a compromise of a more than doubtful litigation. It was conducted and concluded fairly, openly, and above board.

Maxwell held no fiduciary relation with these people. He was a defendant, denying absolutely their claim to any

interest whatever in the property. He was at arm's length with them, fighting for his rights and defending his title. He sought no compromise, but proposed to fight it out in the Courts, as he had a right to do. It was *their* proposition, not Maxwell's, that the litigation should be compromised by his paying them a money consideration for their claim; and this proposition was first made and urged, not by some one acting for these infants, but by their father in his lifetime, acting in his own right. Every act and declaration by Maxwell now complained of was perfectly legitimate for a party in his position.

The Bents were represented by able and experienced counsel. Their counsel, two out of three of them that we know of, advised the compromise. It was substantially agreed to by Alfred Bent in his lifetime, and finally agreed to by the adult complainants, including Guadalupe Bent, and accepted by the Court as advantageous to the minors. The Court had all the parties before it, was familiar with the circumstances of the whole case, and was better able to judge what was fair and right, and for the benefit of the minors under the conditions then existing, than this Court can possibly be. There is not the slightest intimation that the Court was imposed upon by misrepresentation of the facts, upon which it acted. Every presumption is in favor of the decree, and the decree itself is conclusive of every fact necessary to support it.

"It is an elementary rule that the judgment of a court of general jurisdiction need not state the facts or conclusions of fact upon which it is founded or authorized. This it is which primarily distinguishes it from the judgment of a court of inferior jurisdiction. That which is necessary to the judgment of such a court is presumed to have been shown to it, and found and determined by it."

Gager v. Henry, 5 Sawyer, 241, 242.

Grignon v. Astor, 2 How. 339, and cases cited.

The fact that there was a mutual agreement between the parties, settling and determining all the equities in the cause, upon which the decree was entered, is solemnly recited in the record thereof, and is a matter adjudicated by the Court in the case before it, and no person can now be heard to say, at this late day, that the fact was otherwise.

And besides this, the fact of the compromise agreement, in the exact terms upon which it was consummated, is also conclusively established by the findings in the present case.

Such compromises are favored by courts of equity.

1 Story Eq., sec. 131a.

2 Lead. Cas. Eq. (4th Am. Ed.) 1903.

In case of infants, if satisfied it is for their advantage.

Lippart v. Holley, 1 Beav. 423.

Brooke v. Mostyn, 33 Id. 457.

Monday v. Monday, 1 Vesey & B., 223.

In re Livingston, 34 N. Y. 578.

"The compromise of a doubtful title, when procured without such deceit as would vitiate any other contract, concludes the parties, though ignorant of the extent of their rights."

Gibson, C. J., in *Hoge v. Hoge*, 1 Watts (Pa.), 163.

"Compromise of a doubtful claim cannot be set aside but for fraudulent misrepresentation of facts, a fraudulent concealment of facts, or such imposition otherwise as amounts to unconscientious and unfair dealing."

Mills v. Lee, C. T. B. Mon. 91 (17 Am. Dec. 125).

"Compromises of disputed property are in all cases desirable, but especially of lands, on which the quiet, peace and subsistence of the citizens of a country so essentially depends, and it is the peculiar duty of courts of justice

to cherish and support them, when they are not intermingled with fraud."

Fisher v. May, 2 Bibb, 448.

"The right of the defendants to appeal from the decree, and the fact that they had declared their intention to do so, created such a dispute in regard to their liability as made it a proper subject for compromise. The compromise was made and fully performed on their part, they paid the money, which was received in payment for the decree, and took no appeal. It is not now open to the plaintiffs in error to treat this payment merely as a credit on account, and hold the defendants to their original liability."

Befinger v. Treyes, 120 U. S. 198.

The Court will act for the benefit of an infant without regard to the prayer of the petition.

1 Dan. Ch. Pr. 73.

De Mandeville v. De Mandeville, 10 Vesey, 59.

Infants are bound by decrees taken by consent, though there be no reference to a Master.

1 Dan. Chy. 163, 164, 974 (5th Ed.).

Walsh v. Walsh, 116 Mass. 383.

Wall v. Bushby, Brown Ch. 484.

Such reference is discretionary.

Lippiat v. Holley, 1 Beav. 423.

A guardian *ad litem* may be appointed for infant plaintiffs, though not usually done.

1 Dan. Chy. 69 (5th Ed.).

After appointment of guardian *ad litem*, the relation of attorneys and solicitors to the case is precisely the same as in the case of adults.

Doe v. Brown, 8 Blackf. 443.

Infants are bound by the conduct of solicitors.

1 Dan. Chy. 74 (5th Ed.).

Walsh v. Walsh, 116 Mass. 382.

Tillotson v. Hargrave, 3 Madd. 494.

Levy v. Levy, 3 Id. 245.

1 Freeman on Judgments, sec. 151.

2 *Ibid.*, sec. 513.

Among other allegations of error the bill charges that the Court in 1866 entered the decree without any reference to a Master, or judicial inquiry as to whether the agreement for compromise had been made, or whether the decree would be for the benefit of the infants. (Rec., p. 10.) The negative thus asserted cannot be shown by the record of the cause. The mere fact that the files do not contain these proceedings, nor the decree itself recite them, does not tend in the slightest degree to prove that they did not exist. If they were proper and necessary, the decree itself raises the presumption that they were done.

"If the record is silent with respect to any fact which must have been established before the Court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge."

Settlemier v. Sullivan, 97 U. S. 444.

It would require evidence of facts outside the record to establish the negative, and this again would be fatal to the bill as a bill of review, under the law as declared by this Court in 95 U. S., p. 397.

It is stated several times in the briefs of appellants that at the time of the proceedings in the District Court of Taos county in 1866 the complainants had no counsel,

and that the relation of attorney and client between them and the counsel of record in the case had ceased to exist.

There is nothing whatever in the record to warrant such an assertion as this. It is based on the statement in the findings (Rec., p. 77) that upon the delivery of the deeds by Guadalupe Bent and the adult complainants, May 3, 1866, Scheurich and his wife assumed for complainants payment of the fees of their counsel, and paid the same. It does not say that the counsel were discharged; and in the absence of a positive showing of a change of counsel by order of the Court it must be presumed that the same counsel continued so long as the case remained on the docket.

Authority to do an act, and other relations or conditions of persons or things, once shown to exist, are presumed to continue until the contrary is proven.

Lawson on Presumptive Evidence, p. 172.

19 Am. & Eng. Enc. of Law, p. 75.

Much stress is also laid upon the statement that the decree of 1866 was not entered by the *personal* procurement of Scheurich or Guadalupe Bent. If the decree purported to accomplish some scheme different from that which had been agreed to, this suggestion might be entitled to some consideration. But as it is in perfect conformity with the settlement already made, there is nothing remarkable in the fact that the clients did not *personally* procure or know of the preparation or entry of the decree. Such technical matters would naturally and properly be left to counsel.

The Price was Adequate.

Inadequacy of price, known to Maxwell and concealed from the Bents, is another iniquity charged in the bill, and freely dwelt upon.

Now, it is probable that Maxwell knew more about the grant and its value then than anyone else. Whatever value it had at that time had been created by the efforts of himself and Beaubien. (Beaubien's answer, Rec. p. 54.) He had settled there when others dared not go, and maintained himself against Indians, expended many thousands of dollars in the improvement and development of the property and perfecting its title, to which the Bents had never contributed a farthing's aid. But there cannot be said to be concealment where knowledge is open to all who choose to look and inquire. The counsel for the Bent heirs were not ignorant persons; the husbands of the adults, Teresina and Estefana, were men of intelligence and prominence in their community, and they accepted for their wives the same terms of compromise that Guadalupe did.

But the best evidence of all that the transaction was neither unfair nor fraudulent is to be found in the contemporary acts of the heirs of Charles Beaubien, one of the two original grantees, who left a half interest in the grant, undisputed except by this Bent suit. Leaving out the one-fourth claimed by the Bents, he left three-eighths interest in the grant which nobody disputed. He died in 1864, leaving six children—one son and five daughters, one of whom was the wife of Maxwell. They inherited his interest in the grant equally (Rec., pp. 59-60). The husbands of the other daughters were merchants and stock-raisers, were intelligent men, ranked among the best citizens in their community, and were considered men of

wealth and influence. They joined with their wives and Beaubien's son in conveying to Maxwell, from 1864 to 1870, their several undivided and undisputed one-sixteenth interests for \$3,500 each (Rec., p. 68).

These facts, from the current transactions of that day, in the same property, by people who were as well qualified to take care of their own interests as any in New Mexico, furnish the highest proof that could be offered of the fairness of Maxwell's compromise with the Bent heirs.

They suggest a simple question in answer to all allegations of inadequacy of price: If several undisputed interests in this grant, of one-sixteenth each, were sold by men of wealth and influence, in the ordinary course of business, at about the same time—some shortly before and some shortly after—for an agreed price of \$3,500 each, was not \$6,000 a fair price for a disputed claim, involved in pending litigation, to one-twelfth?

The Decree was not against Infants.

The decree of 1866 is continually denounced by our opponents as a decree *against* the infants. There is no more reason for calling it a decree against them than a decree in their favor. It was the result of a settlement brought about at the solicitation of their father, mother, and adult co-complainants. It required Maxwell to pay for their doubtful claim more than he was paying for larger undisputed interests in the property. That this was a provision for their benefit, and in their favor, there cannot be the slightest doubt. And if necessary, it is perfectly competent for this Court to again declare upon this entire record—which brings before the Court everything in the original suit, everything that would have been be-

fore the appellate courts on Maxwell's appeal from the partition decree if the compromise had not been made, and everything that would be before appellate courts hereafter, if the litigation were now to be relegated to that situation by annulling the compromise decree—that the compromise decree was in the interest and for the advantage of the infant complainants.

The Price was Paid.

An effort is made to show that the price agreed upon was never paid by Maxwell to Guadalupe Bent or her children. His notes were accepted in payment for their conveyances by all the complainants in the suit, including, as well the adults, Teresina and Estefana and their husbands, as Guadalupe as guardian of her children. They amounted to \$18,000, divided into such sums as were desired by the parties (Rec., p. 76). Guadalupe received one of these for something over \$5,000. The reason why her note was for less than \$6,000 is explained (Rec., p. 77): Scheurich and his wife assumed and paid the fees of counsel for complainants in the suit, and the amount so paid was included in the note of Maxwell given to Scheurich's wife, and the *pro rata* amount deducted in equal proportions from the other two notes given to Guadalupe Bent and Estefana Hicklin. The Court below finds (Rec., p. 76) that "Maxwell was at all times after the making of the note a man of ample financial responsibility." The mere fact that an unascertained amount remained unpaid on the note at the beginning of the Maxwell Company's suit in 1870—which the Court finds to be the weight of the evidence, upon testimony which it declares to be conflicting (Rec., p. 76)—would neither invalidate the deed of Guadalupe, or the decree authorizing it, nor tend to prove

that the Bents ever had a title for which anything should have been paid. It would establish nothing more than a still subsisting, collectible money demand against a solvent man for something.

The facts stated by the lower Court in its findings, we respectfully submit, establish that the note was paid.

The note is not in the possession of complainants, but had been delivered to Maxwell. This fact raises the presumption of payment.

Lawson on Presumptive Evidence, 346-349.

Upon this rule of evidence the author states as follows :

"This rule is founded on a reasonable principle, which is supported by numerous cases that where bills of exchange, checks, orders for the payment of money or goods, promissory notes or other obligations are paid, they, as a general rule, go into the hands of the person paying them. It is to be presumed, as already said, that a man paying a written obligation will take it into his possession."

" 'When,' said Lord Ellenborough to the jury in an old case, 'there is a competition of evidence upon the question whether a security has or has not been satisfied by payment, the possession of the cancelled security ought to turn the scale in his favor, since in the ordinary course of dealing the security is given up to the party who pays it.' It has been held that where the defense of payment of a note or other security is made, and the evidence on both sides is evenly balanced, the possession by the plaintiff of the uncanceled paper will turn the scale in his favor."

This presumption is no doubt rebuttable, but only by evidence so strong and positive as to carry conviction. But what explanation is given here? None whatever, except a statement of Mr. Thompson, which is so palpably unreasonable and incredible, that no Court should give it

the slightest consideration. He says that he sent it to Maxwell "to have a credit indorsed, and that he never got it back." The holder of a note is often called upon to indorse a partial payment upon the note for the protection of the maker. But that he should send it to the maker for that purpose, instead of indorsing the payment himself, or having it done by Guadalupe Bent, is out of all reason. It does not appear that any effort was made to recover the note, but the fact is expressly stated that Maxwell did not refuse to return it. Maxwell died in 1875 and we cannot have his story. But he lived a solvent man up to the commencement of the Maxwell Company's suit in 1870. And so we are asked to believe that this note, the paper of a man at all times of ample financial responsibility, was simply abandoned by the parties owning it for at least three years after it became due, and no effort ever made afterwards to collect it. Common sense, and the presumption of law as well, would declare upon these facts alone that the note was paid. But when to this is added the further fact that the payee of the note, Guadalupe Thompson herself, swears that it was paid, it seems to us that there cannot remain the slightest doubt about it.

Besides all this it appears from the record of the proceedings of the Probate Court of Taos county that by the will of Alfred Bent, Guadalupe Bent was named as executrix, qualified as such under the title of "Administratrix," made and filed in the Probate Court an inventory, in which the note of Maxwell was duly listed, and continued to exercise her functions as such as late as October 25, 1867, when she approved a claim of Horatio Long against the estate for \$1,790, which was allowed by the Court. (Rec., pp. 63-68.) Being thus within the jurisdiction of the Probate Court, and it being conceded that Maxwell

NOTE.—When the proofs were taken under the bill of 1870, Maxwell could not testify on account of interest :
Pino v. Beckwith, 1 N. M. 19, 27.
Ward v. Broadwell, *ibid.* 75, 90.

Before proofs were taken after the case was remanded, and before the evidence act of 1880 was passed allowing interested parties to testify, Maxwell was dead.

was at all times financially responsible, the presumption arises—irrespective of any conflicting testimony of witnesses—that Guadalupe Bent did her duty as administratrix, by collecting the note and making a proper application of the proceeds, under the direction and with the approval of the Court.

But, at all events, the Maxwell Land Grant and Railway Company, purchasing this property four years afterwards for a valuable consideration (Rec., p. 12; and, in No. 90, pp. 66, 77, and 20), cannot be chargeable with notice of the non-payment of the money, nor can its title be affected by the fact, whatever it may be. It found on record in April, 1870, the deed of Guadalupe Bent, reciting and acknowledging payment for some claim to the property for which there was no record title, and of which the only evidence was to be found in the proceedings in a suit which was finally disposed of, and no longer on the docket. It had a right to rely upon this record evidence of the extinguishment of the claim. No court of equity would ever disturb a title acquired under such circumstances, upon an allegation that some unknown portion of the consideration for the deed was unpaid, much less will a court of equity do it with the facts in this record before it, showing that by all the rules of human conduct, it *must* have been paid.

Not only so: If this were a controversy between Maxwell and the Bent heirs, it might be said that Maxwell, having agreed to a compromise with them, must stand to its terms in every particular. But the Maxwell Land Grant and Railway Company, as a subsequent purchaser for value, is entitled, if necessary, upon this, as well as other questions in the case, to look back of the matter of payment, and see whether the Bents ever had any title for which anything ought to have been paid.

The statement is made in this bill, and was dwelt on with frequent repetition in the argument of opposing counsel below, that there was no necessity for the sale of any real estate for the maintenance of the children of Alfred Bent.

As we have before shown, this was not in any sense a proceeding for the sale of the infant's real estate, and is not to be tested or judged by any of the rules applicable to such proceedings. But even on this point we are not without facts in the record which show that such necessity did exist. The best evidence on this subject is that furnished by the probate record of the estate. (Rec., pp. 65-68.)

The inventory of the property left by Alfred Bent, and filed by Guadalupe Bent as executrix, shows that outside of the real estate and the \$5,000 note received from Maxwell upon the compromise, the assets of the estate amounted to only \$1,408, while the liabilities were as follows :

Debts mentioned in will.....	\$569	
	60	
	4	
	<hr/>	\$633
Claim of Horatio Long, admitted by administratrix and verified by the affidavit of Geo. W. Thompson.....		1,790
		<hr/>
Total	\$2,423	

Thus leaving a balance of indebtedness of \$1,015 in excess of the entire personal property of the estate.

This proof, from the records of the probate court, effectually disposes of the claim that there was no necessity for disposing of any interest in lands for the maintenance of the children.

Remembering the prices at which the Beaubiens sold their interests in the grant, what would the Bent estate have probably received for its claim against Maxwell if, instead of being compromised, it had been sold under decree of Court at the suit of creditors to make up the deficiency in personal property and pay the debts of the estate?

IV.

If the Decree of 1866 were Erroneous Complainants would still be without any Cause of Action.

It is assumed by our learned opponents throughout this controversy that the only thing between them and a twelfth part of this estate, so rich in adjectives at least, is the decree of 1866, and that if it is annulled an absolute estate will *ipso facto* vest in their clients, and nothing will be left to do but to parcel out the property.

Let us consider what would have been the practical result if the District Court had adopted their views, and vacated the decree of 1866. The interlocutory decree of 1865 would have been restored to the record and the case would have stood where it had been immediately after its entry. Upon the application for an order to appoint new commissioners for partition, defendants would ask a rehearing upon the interlocutory decree. Either then, or upon final hearing, after new commissioners had been appointed and had reported, the Court would have to pass upon the question, whether on the law or the facts the Bents ever had any title to an interest in the grant. In the unsupposable event that the Court should hold that complainants had established title, and the right to partition, defendants would appeal from the final decree to the Court of last resort.

Whatever may be the impression of the Court upon the other questions discussed, there is no escaping the proposition that at sometime, either now or hereafter, when our successors shall argue and sit in judgment, the grantees of Maxwell are entitled to the judgment of the Court of last resort upon the question whether in their original suit the Bents showed title to any interest in this property upon which a partition could be had. Therefore, why should not the Court, with all the facts before it which could ever be ascertained, pass upon this question first of all?

Our opponents said to the District Court, as they now say to this Court, that the interlocutory decree of 1865 is sacred and inviolable. Right or wrong, it must be taken, not simply for what it purports to be, but for what they claim it to be, and all the costly machinery of a court of equity must be put in operation to carry it into execution, regardless of the fact that it is certain to be ultimately reversed by the appellate court and the bill dismissed. They are here asking equity to obtain affirmative relief by disturbing an existing and settled status of property. And yet they insist that the Court shall plunge ahead—blindly, illogically and unreasonably—to do that which it may know to be inequitable and unjust, and which will only lead to ultimate reversal and defeat.

And this, also, regardless of the rights of subsequent purchasers for value, who acquired their title four years later, and after the lapse of the period within which an appeal could have been taken from the decree of 1866.

But such are not the methods of equity. If there were nothing else in this case, the Court must necessarily, before setting in motion this new train of litigation, consider as an inquiry precedent to all others, the propriety of the interlocutory decree of June, 1865, which it is now asked

to re-establish and carry into execution. Such an inquiry is in no sense a "collateral attack," as our learned opponents throughout their brief assume. The decree is already dead, and the effort is to revive it. It has been vacated and blotted out of existence by the Court which made it. It is a nonentity. In order to resurrect it the Court is now asked to act affirmatively, and restore this decree by annulling another.

Such relief is not a matter of right, to be had by anyone for the asking. It calls into action the highest power of a Court of equity, one which is never exercised unless the court is satisfied, upon consideration of all the facts before it, that there is a substantial reason for it, founded upon the ultimate justice of the case. The Court is not bound to act at all. It may act or it may remain passive; and it will do the one or the other according to its own notions of what is reasonable and proper, with regard not only to the rights and interests of the parties, and of subsequent purchasers, but also to the interest of the public as well, which is that there be an end of suits, and that titles and business be not disturbed by fruitless and unfounded litigation. Courts will not do a vain and useless thing, and before any Court will undertake to disinter the skeleton of this decree, and breathe into it the breath of life, it will first inquire if there ever was any reason for its existence, or a probability of its arriving at maturity, and upon finding that there was neither, will leave it at rest forever.

Respectfully submitted,

FRANK SPRINGER,

Counsel for Appellees.

Statement of the Case.

THOMPSON v. MAXWELL LAND GRANT AND
RAILWAY COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW
MEXICO.

No. 91. Argued November 2, 3, 1897. — Decided December 6, 1897.

That which has been decided on one appeal or writ of error, cannot be reëx-
amined on a second appeal or writ of error, brought in the same suit.

Whenever a case comes from the highest court of a State for review, and,
by statute or settled practice in that State, the opinion of the court is a
part of the record, this court may examine such opinion for the purpose
of ascertaining the grounds of the judgment.

Although the judgment and the mandate in a given case in this court
express its decision, it may examine the opinion for the purpose of
determining what matters were considered, upon what grounds the
judgment was entered, and what has become settled, for the future
disposition of the case.

In the former decision of this case, 95 U. S. 391, the decree was reversed
on the ground that the bill, as it stood, was technically a bill of review;
but it was further decided that certain matters then in issue were suffi-
ciently and effectually determined by the proofs already in, and the re-
versal did not throw open the case for additional proofs upon such
matters.

An infant is ordinarily bound by acts done in good faith by his solicitor or
counsel in the course of the suit, to the same extent as a person of full
age; and a decree made in a suit in which an infant is a party, by consent
of counsel, without fraud or collusion, is binding upon the infant and
cannot be set aside by rehearing, appeal or review.

A compromise made in a pending suit which appears to the court to be for
the benefit of an infant, party to the suit, will be confirmed without ref-
erence to a master; and, if sanctioned by the court, cannot be afterwards
set aside except for fraud.

THE facts in this case are as follows: In 1841 the Republic
of Mexico made a grant to Charles Beaubien and Guadalupe
Miranda of a large tract of land, generally known of late as
the Maxwell Land Grant; so known because Lucien B. Max-
well, having acquired title from Beaubien and Miranda or
their heirs, was, or at least claimed to be, for many years the
sole owner. In September, 1859, the heirs of Charles Bent,
namely, Alfred Bent and his two sisters, Teresina Scheurick

Statement of the Case.

and Estefana Hicklin, brought a suit in the District Court for the county of Taos in the Territory of New Mexico, against Beaubien, Miranda and Maxwell, claiming that under a parol contract their father, Charles Bent, was interested with Beaubien and Miranda in the ownership of the grant, and praying that such interest be established and decreed, and that it be also set off to them by partition. In June, 1865, upon the pleadings and proofs the court decreed to them an undivided fourth part of the grant, and appointed commissioners to make partition, giving specific directions for their guidance. Nothing was done under this decree. Soon thereafter negotiations were entered into between plaintiffs and Maxwell for a compromise of the litigation on the basis of Maxwell paying them a money consideration to relinquish their claim. It was agreed by the three plaintiffs that Alfred Bent and Aloys Scheurick, the husband of one of the sisters, should act in the matter as their agents to sell to Maxwell for the best price they could obtain, but never less than \$21,000, or what Beaubien's heirs received. This compromise was advised and approved by their counsel. A conference was had in September or October, 1865, at Maxwell's residence, at which Alfred Bent demanded \$21,000 and Maxwell offered \$18,000. Alfred Bent returned from that conference to Taos, where the family resided, without having effected a definite agreement as to the price. The plaintiffs, however, considered the sale as good as made, but Alfred Bent advised his co-plaintiffs that they could get a few thousands more by being quiet a few days, insisting, however, on having as much as the Beaubien heirs should receive. The plaintiffs expected to close the bargain in a few days, were ready to make the deeds as soon as the matter was settled, and the deeds were in fact written out by Scheurick, the husband of one of the plaintiffs. Before the compromise was consummated and on December 15, 1865, Alfred Bent died, leaving surviving him his widow, Guadalupe Bent, and three infant children, Charles, Julian and Alberto Silas, aged respectively six, four and one years. On April 12 his widow was appointed administratrix of his estate and qualified. Just before his death Alfred Bent made a will, by

Statement of the Case.

which he gave and bequeathed to his wife, "for the maintenance of her and my three children, Charles, Julian and Silas Bent, all of my real and personal property." But this will was not presented until March, 1867, when it was approved and admitted to probate. Beaubien, one of the original grantees, had left six children surviving. Maxwell married one of them, and between April 4, 1864, and January 1, 1870, purchased the interests of the other five for a consideration of not more than \$3500 each. On April 9, 1866, the death of Alfred Bent was suggested, and his minor children and heirs, Charles, Julian and Alberto Silas, were by order of the court substituted as complainants in place of their father. On April 12, the mother of these minors, Guadalupe Bent, was by the court appointed guardian *ad litem* and commissioner in chancery for such minors, with full power to execute deeds or carry into execution all sales or transfers made of their interest in and to the real estate described in the suit to Lucien B. Maxwell. A settlement with Maxwell was concluded by Aloys Scheurick, acting for his wife, his wife's sister and her husband, and the widow as guardian *ad litem* for the minor children of Alfred, which was acceptable to all the parties, by which Maxwell was to pay the sum of \$18,000 for the conveyance of the interest of the Bent heirs. This compromise was advised by their leading counsel. In May the two sisters, by separate deeds, conveyed their interests to Maxwell, and during the same month Guadalupe Bent, as guardian *ad litem* and reciting the order of April 12, also executed to Maxwell a conveyance of the interest of the minors. Each of these conveyances purported to be for the sum of \$6000. At the next term of the court, about four months after the execution and delivery of these deeds, and on September 10, 1866, a further order or decree was entered, which read as follows:

"Whereas an interlocutory decree was rendered at a former term of this court in the above cause, decreeing one fourth of the land mentioned in the petition herein to the complainants in this cause, and appointing commissioners to divide and set apart the portion so decreed, and whereas said interlocutory decree was never carried into effect, and whereas since the

Statement of the Case.

time of the rendition of said decree a mutual agreement has been made between the parties to this cause, settling and determining all the equities to the same:

"It is therefore hereby ordered, adjudged and decreed by the mutual consent and agreement of the said complainants as well as of the said defendants in this cause, that the interlocutory decree above mentioned, together with all orders made under and by virtue of the same, be set aside; and, by the mutual consent and agreement of the said parties, it is hereby further ordered, adjudged and decreed that the said Lucien B. Maxwell, one of the defendants in this cause, pay to the said complainants the sum of eighteen thousand dollars, to be divided among them *per stirpes*, that is, to the said Aloys Scheurick and Teresina Bent, his wife, one third part, and to Alexander Hicklin and Estefana Bent, his wife, another third part, and to Charles Bent, Julian Bent and Alberto Silas Bent, the children and heirs of Alfred Bent, deceased, the remaining third part, to be equally divided among the said last named and to be paid into the hands of Guadalupe Bent, widow of the — Alfred Bent, deceased, and guardian *ad litem* for said children for the purposes of the said division.

"And upon the further consent and agreement of the said parties, it is hereby further ordered, adjudged and decreed, that the said Alexander Hicklin and Estefana Bent, his wife, the said Aloys Scheurick and Teresina Bent, his wife, and the said Guadalupe Bent, guardian, *ad litem*, for Charles Bent, Julian Bent and Alberto Silas Bent, children and minor heirs of the said Alfred Bent, deceased, within ten days from the day of the date of this decree, make, execute and deliver to the said Lucien B. Maxwell good and sufficient deeds of conveyance of all their right, title, interest, estate, claim and demand of, in and to the lands in controversy in this cause; the said Guadalupe Bent, guardian *ad litem* as aforesaid, in the name of Charles Bent, Julian Bent and Alberto Silas Bent, minor heirs as aforesaid, and the said Alexander Hicklin and Estefana Bent, his wife, and the said Aloys Scheurick and Teresina Bent, his wife, in their own names. And by further consent and agreement between the said parties, it is hereby further ordered, adjudged

Counsel for Parties.

and decreed, that the costs of this suit shall be paid, each of the said parties to pay the separate costs in the same made by themselves."

In April, 1870, Maxwell, claiming to have the full title to the entire grant, conveyed all except a few acres to the Maxwell Land Grant and Railway Company. In August of that year Maxwell and the Maxwell Company filed a bill in the District Court against the appellants Guadalupe Thompson and her husband, (the former being the widow of Alfred Bent, who had since intermarried with George W. Thompson,) and the three minor children of Alfred Bent, which, after reciting in a general way the history of the grant and the proceedings in the former suit, alleged that it was doubtful whether the order and decree of September, 1866, fully expressed the agreements of the parties, or fully cancelled and discharged all claims that the infant heirs of Alfred Bent had in the land, and prayed that the defendants be adjudged to have no interest in or title to the premises, equitably or otherwise, and that the plaintiffs' title be quieted. Subsequently the bill was amended, and thereafter, the defendants having answered and proofs having been taken, a decree was entered sustaining the prayer of the bill and quieting the title of the plaintiffs in the premises. This decree was affirmed on appeal by the Supreme Court of the Territory, but on further appeal to this court was reversed, 95 U. S. 391, and the case remanded to the territorial courts for further proceedings. Subsequent proceedings having been had therein a new decree was entered by the District Court in favor of the plaintiffs, which on appeal to the Supreme Court of the Territory was affirmed, and from such decree of affirmance this appeal has been taken.

Mr. John G. Carlisle for appellants. *Mr. S. D. Rouse*, *Mr. James O'Hara*, *Mr. Caldwell Yeaman*, *Mr. E. T. Wells*, *Mr. R. T. McNeal*, *Mr. John G. Taylor* and *Mr. Logan Carlisle* were with him on the briefs.

Mr. Frank Springer and *Mr. A. B. Browne* for appellees. *Mr. A. T. Britton* was with them on the brief.

Opinion of the Court.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be reëxamined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. *Supervisors v. Kennicott*, 94 U. S. 498, and cases cited in the opinion; *Clark v. Keith*, 106 U. S. 464; *Chaffin v. Taylor*, 116 U. S. 567; *Northern Pacific Railroad v. Ellis*, 144 U. S. 458; *Great Western Telegraph Company v. Burnham*, 162 U. S. 339, 343.

Whenever a case comes from the highest court of a State for review, and by statute or settled practice in that State the opinion of the court is a part of the record, we are authorized to examine such opinion for the purpose of ascertaining the grounds of the judgment. *N. O. Water Works Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18; *Kreiger v. Shelby Railroad*, 125 U. S. 39; *Egan v. Hart*, 165 U. S. 188. We take judicial notice of our own opinions, and although the judgment and the mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered and what has become settled for further disposition of the case.

We, therefore, turn to the former opinion and the mandate to see what was presented and decided. The ground upon which the reversal was ordered was that the bill as presented, especially after the amendment, was technically a bill of review, and as such could not be maintained for three reasons: First, because the decree sought to be reviewed was a consent decree; secondly, because the bill was filed on behalf of an assignee of the original defendant; and, thirdly, because it sought a modification of the decree upon a matter of fact not appearing upon the record, without alleging any newly discovered evidence unknown to the parties before that decree. The opinion by Mr. Justice Bradley gives a full history of the litigation, the substance of the allegations in the bill of com-

Opinion of the Court.

plaint, and points out why, especially after the amendment, it must be regarded as a bill of review. The amendment put into the prayer these words: "That for the aforesaid errors of law, apparent on the face of the said decree of 10th September, 1866, the same may be reviewed and reversed in the points herein complained of." But after demonstrating that the bill as it stood must be deemed a bill of review, and not sustainable, the opinion proceeds:

"Nevertheless, the general purpose which it evidently had in view — the quieting of the title to the land in question — is one towards which a court of equity is always liberally disposed, as tending to promote the peace of society and the security of property. And if, instead of seeking to reverse the decree of September, 1866, (which, for like reasons of public policy, as applicable to the security of judgments that have passed into *rem adjudicatam*, is not allowable,) the bill had sought to carry that decree more effectually into execution, it would have been free from legal objections, and equally conducive to the object in view."

And then, after quoting from Lord Redesdale, it adds:

"The bill in this case, as originally filed, before it was converted by amendment into a bill of review, and abating the allegations of error in the original decree, approximated to the character of such a bill as might have been sustained. The proofs show a case which, in our judgment, supports the conclusions of the decree, to the effect that the terms of compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants, and were so considered and accepted by the court in their behalf. But, so far as the present decree undertook to reverse and modify the decree of September, 1866, we think it is clearly erroneous. Still, although we feel obliged to reverse the present decree, we do not think that the bill should be absolutely dismissed. And, as the whole question between the parties has been fully litigated on the proofs, it would be unreasonable to require that these should be taken over again.

"Our conclusion is, that the present decree must be reversed

Opinion of the Court.

with costs, and that the cause be remanded to the court below, with directions to allow the complainants to amend their bill as they shall be advised, and with liberty to the defendants to answer any new matter introduced therein; and that all the proofs in the cause shall stand as proofs upon any future hearing thereof, with liberty to either party to take additional proofs upon any new matter that may be put in issue by the amended pleadings."

The mandate contained an order in the language of the last paragraph.

Although the former decree was reversed on the ground that the bill as it stood was technically a bill of review and could not, under the circumstances, be maintained, obviously the decision went beyond the determination of this matter. The case was not remanded with instructions to dismiss the bill as one not maintainable. It was decided that there were allegations in the bill which, if certain matters were stricken out, would make it properly one to more effectually carry into execution the consent decree of September, 1866, to establish beyond further controversy the settlement then made, and to quiet the title of the plaintiffs. It was also perceived and decided that the proofs already taken made out a case which justified such relief, and that while the proofs did not establish one of the principal facts set forth in the original bill, to wit, that the settlement was simply carrying into effect a compromise concluded with Alfred Bent, the father of the minors, during his lifetime, they did establish that such settlement made by the mother and guardian was advantageous to the infants, and was so considered and accepted by the court in their behalf. Not only was there no dismissal of the bill, but beyond that, the case was not opened for new proofs in respect to matters distinctly put in issue by the pleadings as they stood, and in respect to which it was determined that the proofs already in were sufficient. The plaintiffs were authorized to amend their bill, as they should be advised, but obviously this contemplated such amendments as would make the bill one of the character and scope indicated in the opinion. The defendants were given leave to

Opinion of the Court.

answer any new matter that should be introduced into the bill, thus impliedly excluding the right to make new answer to those matters which should not be changed. And further, while it was ordered that the proofs already taken should stand as proofs upon any future hearing, no leave was given to take further testimony upon the matters already in issue, but simply to make additional proofs upon any new matter that might be put in issue by the amended pleadings. Language could not be clearer to show that this court decided that certain matters then in issue were sufficiently and effectually determined by the proofs already in, and did not throw open the case for additional proofs upon such matters. To now consider the case as reopened in its entirety and to inquire whether each and all of the matters in issue are or are not established by the proofs, including those taken subsequently to the prior decision, would be to practically treat the case as entirely new, and ignore that which was considered and determined on the former hearing.

In the light of that decision it is not difficult to reach a conclusion upon the record as it now stands. When the case went back to the trial court the plaintiffs added no new matter to their bill. They made ten amendments, nine of which consisted simply in striking out certain paragraphs and sentences, and the tenth in transposing the position in the bill of one paragraph. There was, therefore, nothing new to which the defendants were called upon, or permitted by the decision, to make answer. The parts of the bill stricken out were such as tended to make it, according to the opinion of this court, technically a bill of review, and left it strictly such a bill as was approved of in that opinion. The defendants filed answers to the amended bill. These answers contained new matter. This new matter was substantially that the consent decree of September, 1866, was not made at the request or with the consent of the solicitor of the defendants or any of them, nor did the minors or any one having authority to represent them ever authorize any solicitor to consent to any decree for the transfer or surrender of their rights; that the pretended agreement and proceedings were fraudulent as

Opinion of the Court.

to minors, and involved an unjust, erroneous and illegal sacrifice of their just and valid rights; that their interest in the grant alleged to have been sold, released or surrendered for the sum of \$6000 was at that time worth not less than \$100,000, and is now worth a much greater sum, and that the alleged settlement and compromise was not in any way beneficial or advantageous to the minors, or necessary for their support or maintenance. The record now brought before us contains none of the proofs taken and offered on the hearing, but only the findings of fact made by the court. This is in accordance with the procedure prescribed by statute for the review in this court of cases heard and determined in the territorial courts. It does appear, however, that after the return to the trial court of the mandate in this case, and on April 7, 1882, the children of Alfred Bent commenced an independent suit against the Maxwell Land Grant Company and all other parties supposed to have any interest in the grant, to establish their title to a one twelfth part of the estate; that issues were made up in that case and proofs taken, and that by consent of counsel the proofs taken in that case were used as proofs in this. The findings of fact in the two cases are substantially similar. In that a decree was entered dismissing the bill, and it is now pending in this court, the next case on its docket, and submitted and argued with this. It may well be considered within the scope of the prior decision that as no new matter was introduced into the plaintiffs' bill the defendants were not warranted in setting up any new defences, and that upon the issues as they stood after the amendments to the bill, striking out portions thereof and the proofs then taken, the only thing which the trial court ought to have done was to have entered a decree thereon quieting the plaintiffs' title in accordance with the views expressed by this court.

But passing that, and considering the case in the light of the issues as they stand upon the amended pleadings and the findings of fact made by the lower court, we are clearly of opinion that its decree in favor of the plaintiffs must be sustained. These findings show that in the lifetime of Alfred

Opinion of the Court.

Bent the counsel of himself and his two sisters advised them to settle with Maxwell rather than take the award of the commissioners; that on a conference between Alfred Bent, acting for himself and his sisters, and Maxwell, the former demanded \$21,000 as the consideration of such settlement, and that Maxwell offered \$18,000, a difference of \$3000, or only \$1000 for each of the three parties plaintiff; that while no definite agreement was then completed the Bents considered the sale as good as made, prepared deeds for carrying such settlement into effect, and only waited on the advice of Alfred Bent that by delaying a few days they might get more money, he insisting that they should receive as much as the Beaubien heirs obtained. The findings also show that the amount which was finally accepted was larger proportionately than that which the Beaubien heirs received for their interests; so that while it may be technically true that no settlement was accomplished during the lifetime of Alfred Bent, it does appear that negotiations had proceeded so far that the Bent heirs considered one accomplished, and prepared to carry it into effect. Scheurick and Hicklin, the husbands of Alfred Bent's two sisters, as well as the four husbands of the Beaubien heirs, who during these years sold and conveyed their interests to Maxwell for less sums proportionally than the Bent heirs received, were intelligent men, ranked among the best citizens of the community, and were considered men of wealth and influence, so the case is not one of an advantage taken of ignorance and inexperience. It further appears that the compromise as finally made was advised by the leading counsel for the Bent heirs; that the sisters, who were adults, with their husbands, executed deeds for the same amount, and have never since questioned the propriety and validity of the settlement. The findings also show that "at and about the year 1866, and for several years thereafter, there was no demand for or sales of undivided interests in lands of the quantity, character and location of those in question, such as to create any ascertainable market value thereof;" that the opinions of the witnesses examined in the present suit varied from two and one half cents to one dollar and twenty-five cents per acre, and that it

Opinion of the Court.

is impossible to satisfactorily ascertain or fix what was the value per acre of the grant at that time, the "value being largely speculative for the future." The court further expressly finds that the mother and guardian *ad litem* knew the character and scope of the instrument she was signing; knew that it was a settlement of the claims in favor of her children; was satisfied with the sum paid, and "that no fraud, imposition or error has been shown to have entered into said transaction, or to have brought about said compromise decree."

That infants are bound by a consent decree is affirmed by the authorities, and this notwithstanding that it does not appear that a prior inquiry was made by the court as to whether it was for their benefit. In 1 Dan. Ch. Pl. & Pr. 163, it is said:

"Although the court usually will not, where infants are concerned, make a decree by consent, without an inquiry whether it is for their benefit, yet when once a decree has been pronounced without that previous step, it is considered as of the same authority as if such an inquiry had been directed, and a certificate thereupon made that it would be for their benefit. In the same manner, an order for maintenance, though usually made after an inquiry, if made without would be equally binding." (In support of these propositions many authorities are cited in a note.) . . . "An infant defendant is as much bound by a decree in equity as a person of full age; therefore, if there be an absolute decree made against a defendant who is under age, he will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it; such as fraud, collusion or error."

In *Walsh v. Walsh*, 116 Mass. 377, a decree had been entered as follows: "And the plaintiff and the defendants, . . . Thomas Keyes, . . . and also in his capacity of guardian *ad litem* of Bridget Walsh and William Walsh, consenting to the following decree: And this court being satisfied upon the representations of counsel that the decree is fit and proper to be made as against the said Bridget and William; it is thereupon ordered, and adjudged, and decreed," etc. On

Opinion of the Court.

a bill of review filed by the minors this decree was challenged, among other reasons, on the ground that it appeared to have been made by consent of their guardian *ad litem* and upon the representations of counsel without proof. The court decided against the contention, and speaking in reference thereto, through Mr. Chief Justice Gray, said :

"An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age. *Tillotson v. Hargrave*, 3 Madd. 494; *Levy v. Levy*, 3 Madd. 245. And a compromise, appearing to the court to be for the benefit of an infant, will be confirmed without a reference to a master; and, if sanctioned by the court, cannot be afterwards set aside except for fraud. *Lippiat v. Holley*, 1 Beav. 423; *Brooke v. Mostyn*, 33 Beav. 457, and 2 De G., J. & S. 373.

"If the court does pronounce a decree against an infant by consent, and without inquiry whether it will be for his benefit, he is as much bound by the decree as if there had been a reference to a master and a report by him that it was for the benefit of the infant. *Wall v. Bushby*, 1 Bro. Ch. 484; 1 Dan. Ch. Prac. 164. The case falls within the general rule, that a decree made by consent of counsel, without fraud or collusion, cannot be set aside by rehearing, appeal or review. *Webb v. Webb*, 3 Swanst. 658; *Harrison v. Rumsey*, 2 Ves. Sen. 488; *Bradish v. Gee*, Ambl. 229; S. C. 1 Keny. 73; *Downing v. Cage*, 1 Eq. Cas. Ab. 165; *Toder v. Sansam*, 1 Bro. P. C. (2d ed.) 468; *French v. Shotwell*, 5 Johns. Ch. 555."

Ordinarily indeed a court before entering a consent decree will inquire whether the terms of it are for the interest of the infants. It ought in all such cases to make the inquiry, and because it is its duty so to do it will be presumed, in the absence of any showing to the contrary, that it has performed its duty. In this case, while the decree fails to recite the making of such an inquiry, there is nothing to indicate that it was not made; the circumstances tend strongly to show that it was in fact made, and the finding is that the conclusion reached by the chancellor as to the advisability of the settlement was a sound exercise of his discretion. It is

Opinion of the Court.

true the findings show that this decree of September, 1866, was not made by the personal procurement, knowledge or consent of said Scheurick or Guadalupe Bent, and the fact of the entry thereof was unknown to them for several years thereafter. They also show that there is no pleading, order or proceeding of record disclosing whether or not any inquiry was made by the court; but it does appear that the parties plaintiff, including the infants, were represented by counsel; that the guardian *ad litem* as well as the other adult plaintiffs fully understood the settlement and assented to it; and it is not strange that, having executed conveyances, they left to counsel such further action as should be deemed necessary to perfect the transfer of title. Further, in April prior to this decree, not only was the suit revived in the name of the infant heirs of Alfred Bent, but, on motion of the solicitors for plaintiffs, their mother was appointed guardian *ad litem* and commissioner in chancery, with full power to execute deeds and carry into execution all sales or transfers of their interest in the real estate described to the defendant Maxwell. The court was, therefore, early advised of the fact of a proposed settlement. The consent decree shows fully the terms of the settlement, and it certainly is not straining the presumption in favor of judicial action to assume that the court would not have permitted the entry of this decree, providing for a settlement whose terms were thus disclosed, without being satisfied that such settlement was for the interest of the minors who were under its charge.

Again, the copy of the order directing the appointment of the mother as guardian *ad litem* and giving her authority to make the conveyance was incorporated into the deed which she knowingly executed, so that any inspection of the deed would have disclosed the fact that proceedings were being taken in court looking to the accomplishment of this compromise and settlement. There was no concealment or secrecy in the matter. In this connection we are referred to this paragraph in the opinion of the Supreme Court of the Territory, filed in the companion case to which we have heretofore referred:

"We do not enter into a discussion at large of the testi-

Opinion of the Court.

mony by which it is claimed that the decree of September, 1866, is successfully impeached upon the ground of fraud, and while we are not prepared, in view of the testimony submitted since the decision in *Thompson v. Maxwell*, 95 U. S. 400, to say that 'the proofs show a case which, in our own judgment, support the conclusions of the decree to the effect that the terms of the compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants and were so considered and accepted by the court in their behalf,' we do hold that the judgment of the court at that time in so considering and accepting said terms was shown to be a fair and reasonable exercise of the chancellor's discretion, and that no fraud, imposition or error has been shown to have entered into said transaction or to have brought about said compromise decree."

It will be seen from this that while the Supreme Court of the Territory, under the new proofs presented, was unable to express itself as strongly as this court had done, it did consider that the judgment of the chancellor in considering and accepting the terms of settlement was a fair and reasonable exercise of his discretion. In other words, that court seems to have been of the opinion that under the later testimony it could not be said that the settlement was in fact advantageous to the infants, but at the same time found that the chancellor not only made inquiry and considered the question of advantage, but also exercised fair and reasonable discretion in approving the settlement; and that, certainly, is all that is necessary to uphold a decree of a court. It would be strange, indeed, if, when those authorized to represent minors, acting in good faith, make a settlement of claims in their behalf, and such settlement is submitted to the proper tribunal, and after examination by that tribunal is found to be advantageous to the minors and approved by a decree entered of record, such settlement and decree can thereafter be set aside and held for naught on the ground that subsequent disclosures and changed conditions make it obvious that the settlement was not in fact for the interests of the minors, and that it would have been better for them to have retained rather than com-

Opinion of the Court.

promised their claims. If such a rule ever comes to be recognized it will work injury rather than benefit to the interests of minors, for no one will make any settlement of such claims for fear that it may thereafter be repudiated. The best interests of minors require that things that are done in their behalf, honestly, fairly, upon proper investigation and with the approval of the appropriate tribunal, shall be held as binding upon them as similar action taken by adults.

Again, it is said that it appears from the findings that the guardian *ad litem* was a Mexican woman, and, at the time of the execution of the deed, ignorant of the English language, unfamiliar with business or her duties as guardian, without knowledge of the boundaries or extent of the grant or of the character and value thereof; that Maxwell represented to Scheurick that the grant was not as large as it was supposed to be; that it did not extend into Colorado or beyond the Red River, whereas it did so extend over 200,000 acres; that Scheurick and the guardian *ad litem* believed and were influenced by said representations; that Maxwell, while generous and magnanimous in many respects, was unscrupulous and tyrannical as well, a resolute and determined man, of large wealth and great influence throughout the county of Taos and Territory of New Mexico; that he made threats that unless the Bent heirs accepted \$18,000 for their claims they would never get anything, and that such threats were communicated to the guardian *ad litem*, and that these matters influenced her in making the settlement and conveyance. But it also appears that it was not definitely known at the time where was the boundary line between Colorado and New Mexico; that the guardian *ad litem* acted in concert with the adult plaintiffs who were dealing with their own interests on the same terms, and that she was willing to make the same settlement they did. And when we take into consideration the character, the ability and standing of the husbands of the other adult plaintiffs, the fact that their interests were alike, that they all acted together, that the settlement which was finally made was so nearly that which the father of these minors had proposed in his lifetime, the fact that no fraud, imposition or

Opinion of the Court.

error entered into the transaction or brought about the settlement, it is going too far to hold that the mere weakness and ignorance of the guardian *ad litem*, whose interests were looked after by her brother in law and counsel, or the strength and vigor of the opposing party, are sufficient to invalidate a decree otherwise not open to objection.

Again, it is urged that the whole of the consideration had not been paid by Maxwell at the time of the commencement of this suit. The findings are that, as to the payment, the testimony is conflicting. It seems that Maxwell gave notes for the amount to each of the three plaintiffs. The guardian *ad litem* testified that the note she received had been paid — so testifying because her second husband, Thompson, to whom she was married about thirteen months after the death of Alfred Bent, and to whom, at the time of the marriage, she delivered the note with everything else she had, told her it had been paid. Other witnesses testified that only a portion of it had been paid, and the court found that the weight of the evidence was that at the beginning of the suit a considerable sum was still unpaid, but how much could not be ascertained. Maxwell was at all times a man of ample financial responsibility. No part of the proceeds of the note was paid directly to the minors or their mother, but Thompson, her second husband, supported, maintained and educated the minors during their minority with the funds of his wife and himself the same as his own children, keeping no separate account. The sum and substance of all this is, that each of the three separate plaintiffs took notes for the money Maxwell was to pay in settlement. Whether these notes drew interest or not is not disclosed, but Maxwell was a man of large financial ability, from whom the notes could have been collected at any time if the parties desired, and if either of them permitted the note to remain uncollected it must be assumed that it was for some good reason, possibly for the sake of the interest which the note drew. There is no finding that the note to the guardian *ad litem* had not long since been paid, but simply that it had not been fully paid at the time this suit was commenced, to wit, in 1870. If what was paid was not paid to

Opinion of the Court.

the guardian *ad litem* it was because she had turned the note, as well as all other papers she had, over to her second husband. Whatever may be said as to the carelessness or the irregularity of these proceedings it cannot be doubted that substantially the proceeds of the note went to the benefit of the children, for they were supported and educated by the second husband the same as his own children. In this connection also it is well to notice the fact that, according to the inventory filed by the widow of Alfred Bent as administratrix, outside of the real estate and the note received from Maxwell, the total assets of the estate were \$1408. The claims admitted and allowed in the probate court amounted to \$2423; and while certain witnesses familiar with his affairs testified that he had both real and personal property other than that in the inventory, both in New Mexico and Colorado, it does not appear what amount, if any, there was of such property. It would seem from this that the interests of the minors required the settlement of this claim against Maxwell, in order to secure funds for their maintenance and education, for the whole personal estate of their father, as shown by the inventory, was not sufficient to pay the claims allowed.

These are all the matters which are called to our attention as tending to impugn the validity of this consent decree, and even if we were at liberty under the terms of the prior decision to consider all these new matters we are of opinion that there is not enough in them, singly or together, to justify us in disturbing the settlement which was made and the decree which was entered.

In determining the validity of this transaction it must be remembered that the petition filed in the original case brought by Alfred Bent and his sisters disclosed that the interest which their father claimed in the grant arose out of a parol agreement, and so it is not strange that after a decree had been rendered in their favor their counsel advised a settlement and the receipt of money rather than take the chances of further review in an appellate court; that Alfred Bent, the father of these minors, with his sisters, entered upon negotiations looking to a settlement of their claims, and that although there

Opinion of the Court.

was a difference of \$3000 between what was demanded and what Maxwell offered, they considered the question as settled, and prepared deeds for the purpose of making conveyances of their interests, and that the delay in fully consummating this settlement was owing to the hope of getting a little more money; that only the accidental death of Alfred Bent prevented the consummation of that settlement, a settlement by adults, and one which would never have afforded any excuse for further litigation, as is shown by the acceptance on the part of the two sisters of the settlement in their favor; that while the guardian *ad litem* was an ignorant and inexperienced woman, her interests were looked after by her brother in law, who was a capable business man, and by counsel learned in the law; and, while there may have been some irregularities in the proceedings, yet it is affirmatively found that there was no fraud, imposition or error in the transaction or the decree. Surely under those circumstances the decree ought not to be disturbed.

But there is another aspect in which the equities of this case may fairly be considered. The will of Alfred Bent gave the entire estate to his widow—gave it, it is true, for the maintenance of herself and her children, but nevertheless passed the title to her; and though the will had not been probated at the time of this settlement, it was soon thereafter, and, of course, became operative as and from the date of his death, so that at the time of the settlement the title to this property was in her. The owner by his will gave this property to his widow, and by such will trusted to her to make such disposition of it as she should deem best, relying upon her to use the proceeds for her own maintenance and that of her children. He had a right to make such a disposition of the property and entrust it absolutely to her, and that in respect to this property it was not an unwise disposition is evident, for although he must have known of her inexperience in matters of business, he also knew that her interests were identical with those of his sisters, and that their common interests would be cared for by those competent to look after such affairs. If the settlement made by the sisters, as adults,

Opinion of the Court.

is beyond challenge, should not that made by the widow, also an adult, be upheld, and for the same reasons? The question, under those circumstances, would be not whether she was guilty of any wrongful use of the funds which she received, but whether she as the holder of the title was fraudulently led into the settlement. It is, of course, not necessary to rest this case upon such suggestions, but they are certainly worthy of consideration in determining its equities.

In conclusion, it may not be inappropriate to call attention to some things which are matters of public history, and which are referred to at some length in the *Maxwell Land Grant Case*, 121 U. S. 325. The Mexican colonization law limited the amount of a grant to a single individual to eleven square leagues, and it was claimed that all grants like this in which outboundaries were named were to be taken as simply grants of eleven square leagues per individual, to be laid off within such outboundaries. As there were in this case two grantees, Beaubien and Miranda, it was according to the claim a grant by the Mexican authorities of only twenty-two square leagues, or 97,424 $\frac{8}{10}$ acres. While this, with other grants, was on June 21, 1860, confirmed by act of Congress, c. 167, 12 Stat. 71, claim was still made that the confirmation was operative only for the twenty-two square leagues. Some of the Secretaries of the Interior of the United States refused to issue patents in such cases for any more than eleven square leagues per individual grantee, and not until the case of *Tameling v. United States Freehold Co.*, 93 U. S. 644, decided in 1876, was it settled that such an act of confirmation was equivalent to a grant *de novo*, and included all the lands within the outboundaries. Indeed, in the opinion in the *Maxwell Land Grant Case*, *supra*, decided in 1887, it is intimated that the *Tameling case* was not conclusive upon the question, because that was an action in ejectment in which the legal title shown by the patent prevailed, and not until the case then being considered, in which was a direct attack by the United States upon a patent, could it be held that there was a final adjudication of the question. So that while the owners of the land grant were claiming as against the Government the whole

Syllabus.

area within the outboundaries it was still an unsettled question whether they would finally succeed in obtaining more than the twenty-two square leagues. Was it not a wise settlement for parties, whose claim to an interest in what might be found to be less than 100,000 acres rested simply on a parol agreement therefor, to obtain for that interest a sum which was more than half what the best government land could be purchased for? We think it can be well said, in the language of the Supreme Court of New Mexico, "that the judgment of the court at that time in so considering and accepting said terms was shown to be a fair and reasonable exercise of the chancellor's discretion."

We see no error in this record, and the decree is

Affirmed.

MR. JUSTICE SHIRAS and MR. JUSTICE WHITE dissented.

BENT v. MIRANDA. Appeal from the Supreme Court of the Territory of New Mexico. No. 91. Argued with No. 90 and by the same counsel. **MR. JUSTICE BREWER:** This is a case, the companion of that just decided, as has been indicated in the opinion in that case, and the same considerations compel an affirmance of the decree herein.

MR. JUSTICE SHIRAS and MR. JUSTICE WHITE dissented.
